

No. 11026

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
HOMER G. JOHNSON,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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In the District Court of the United States
for the District of Oregon

Civil Action No. 1693

HOMER G. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT AND PETITION

Plaintiff complains and alleges:

I.

That Plaintiff is a resident and inhabitant of Portland, Multnomah County, Oregon, in the above entitled district.

II.

That on or about the 28th day of April, 1937, acting through the Bureau of Public Roads, United States Department of Agriculture, issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lassen National Forest Highway, Shasta National Forest, Siskiyou and Shasta Counties, California. That as a part of said invitation, the Defendant submitted to prospective bidders plans and specifications prepared by the Defendant upon which bids were required to be based.

III.

That the proposed project covered a distance of approximately sixteen and one-half miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate and conveniently located source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway, which fact was well known to the Defendant. [1*]

IV.

That as a part of the special provisions of the specification, submitted by the Defendant, to prospective bidders, the Defendant included the following provisions:

“-2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 mile right of Station 870 and rock for crushing is available approximately 0.3 mile right of station 1239. Unless other specifically approved in writing by the engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer.”

V.

That Plaintiff obtained from the Defendant a copy of said invitation or call for bids, together with a copy of the plans and specifications, and examined the site of the project, and based upon the

*Page numbering appearing at foot of page of original certified Transcript of Record.

representation of the Defendant as hereinbefore set forth relative to the availability of rock for crushing, Plaintiff prepared and submitted a bid or proposal to the Defendant, which said bid was accepted by the Defendant, and on or about the 27th day of May, 1937, Plaintiff and Defendant entered into a contract pursuant thereto for the performance of the work hereinbefore described.

VI.

That immediately upon notice to proceed with the work provided for by the said contract, Plaintiff moved in on the job and drilled the quarry preparatory to shooting, and during said drilling operations due to the great quantities of soft rock encountered, Plaintiff became apprehensive of the quality of the rock in the said quarry and requested encountered was satisfactory for Defendant's purchase the resident engineer of the Defendant to examine the quarry to determine whether or not the rock poses; that the said resident engineer made an investigation and he in turn notified the district engineer's office of the questionable character of the rock encountered, and that office asked the material engineer to make a further inspection, after which inspection, Plaintiff [2] was ordered to proceed and use the said quarry.

VII.

That Plaintiff thereupon proceeded to open up the quarry by stripping and blasting, and completed the plant setup adequate to produce the crushed rock which could be conveniently used

from that setup, and after crushing about six to eight thousand tons of surfacing material, which came mostly from the outside exposure of the quarry, the engineer and inspectors of the Defendant complained about the quality of the rock which said quarry was producing, and stopped the production of further material until the district engineer's office made a further inspection and determination, which was done, and Plaintiff was again instructed to proceed and use the said quarry for the production of material; that Plaintiff proceeded to strip and blast sufficient additional rock for his estimated requirements and to crush the rock and attempted to deliver it to the project, but the material was repeatedly rejected by the inspectors of the Defendant, and the resident engineer then confined the excavation to a few small pockets within the quarry, which pockets were soon exhausted, and the quarry was then rejected as totally unsatisfactory.

VIII.

That a large quantity of the material required by the specifications consisted of rock suitable for oil processing, which character of rock, due to the fracture requirements, is more economically produced from quarried rock than from gravel, and in submitting his proposal and bid, Plaintiff had determined to produce said oil rock from the quarry hereinbefore described, but Defendant refused to permit the use of any of the quarried material for use as oil rock, and Plaintiff was forced to produce the same by crushing gravel and to haul the same

from near one end of the project over the entire project. [3]

IX.

That after the quarry designated and made available by the Defendant was finally condemned by Defendant, Plaintiff, after considerable delay and prospecting, finally located rock approximately fifteen hundred feet from the original setup, from which sufficient material was produced other than the oil rock to finish the deliveries of materials from that setup, so that not too great a loss would be involved in overhaul from the gravel quarry.

X.

That the repeated rejections of materials hereinbefore described and the extra time spent in locating, shooting, and opening a new quarry, and the additional time required in hauling material from the gravel pit, and in producing the oil rock from the gravel pit delayed the Plaintiff in the performance of his contract, and had such delays not been encountered, said work would have been completed by October 15, 1937, but due to the said delays, the Plaintiff's contract could not be completed before the winter of 1937, and work was necessarily shut down during the said winter, and Plaintiff was required to return to the job in the spring and summer of 1938, and complete the same.

XI.

That although the delay in the performance of the said contract was directly attributable to the

breach of contract by the Defendant in failing to furnish an adequate quarry as set out in the specifications, nevertheless Defendant assessed against Plaintiff a penalty for delay in completion in the sum of \$1575.00 and deducted said amount from the amount earned by Plaintiff under his contract.

XII.

That due to the failure of the quarry as hereinbefore described, Plaintiff was compelled to open a substitute quarry and in so doing incurred an extra cost in opening and operating the said sub- [4] stitute quarry in the sum of \$2490.40, and in addition thereto, incurred an extra cost of overhead and superintendence in the sum of \$660.10.

XIII.

That due to the said breach of contract of Defendant, Plaintiff incurred an extra cost of the hauling of oil rock and oil maintenance rock of \$956.48.

XIV.

That in producing oil rock from the gravel pit from which Defendant wrongfully required its production, as hereinbefore alleged, Plaintiff incurred an extra and additional expense of \$1467.84.

XV.

That due to the delay in completion directly attributable to the failure of the rock quarry, as hereinbefore described, Plaintiff was required to return in the year 1938 and complete his contract and was directed and required by the Defendant to

reprocess and reshape work theretofore done during the year 1937, and in so doing incurred an extra and additional expense of \$2850.17, which would not have been required except for the said breach of contract by the Defendant.

XVI.

That Plaintiff finally completed reshaping and resurfacing the said highway, and his contract was accepted as complete by the Defendant in the month of August, 1938, and final payment of the amount determined to be due Plaintiff by the Government was made to him in the month of January, 1939, and on January 18, 1939, Plaintiff presented to the Defendant, through its District Engineer, B. H. Sweetzer, of the United States Department of Agriculture, Bureau of Public Roads, at San Francisco, California, his claim and demands for damages hereinbefore set forth, but Defendant has refused to pay the same or any part thereof. [5]

Wherefore, Plaintiff prays for a judgment against the Defendant in the sum of Nine Thousand Nine Hundred Ninety-Nine and 99/100 Dollars (\$9,999.99), and for his costs and disbursements.

(signed) JOHN LICHTY

Attorney for Plaintiff

United States of America,
District of Oregon—ss.

I, Homer G. Johnson, being first duly sworn, depose and say:

That I am the Plaintiff in the within entitled suit and that the foregoing Complaint is true as I verily believe.

(signed) HOMER G. JOHNSON

Plaintiff

Subscribed and sworn to before me this 2nd day of December, 1942.

[Seal] (signed) JOHN LICHTY

Notary Public for the State of Oregon. My commission expires: October 27, 1946

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 7th day of December, 1942.

CARL C. DONAUGH

U. S. Attorney for Oregon

[Endorsed]: Filed December 7, 1942. [6]

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America and for its answer to plaintiff's complaint denies as follows:

I.

Denies paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, of plaintiff's complaint and the whole of each paragraph thereof.

Wherefore, defendant prays that plaintiff take nothing by his complaint, and that the defendant have its costs and disbursements.

CARL C. DONAUGH

United States Attorney

By WILLIAM M. LANGLEY

Assistant United States
Attorney

I, John Lichty, attorney of record for the within plaintiff do hereby acknowledge service of this answer to plaintiff's complaint by receiving a true copy of said answer in the City of Portland, Oregon, within the District of Oregon, this 27th day of January, 1943.

/s/ JOHN LICHTY, by A.J.E.

Attorney for plaintiff

[Endorsed]: Filed January 27, 1943. [7]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff complains and alleges:

I.

That Plaintiff is a resident and inhabitant of Portland, Multnomah County, Oregon, in the above entitled district.

II.

That on or about the 28th day of April, 1937, acting through the Bureau of Public Roads, United

States Department of Agriculture, issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lassen National Forest Highway, Shasta National Forest, Siskiyou and Shasta Counties, California. That as a part of said invitation, the Defendant submitted to prospective bidders plans and specifications prepared by the Defendant upon which bids were required to be based.

III.

That the proposed project covered a distance of approximately sixteen and one-half miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate and conveniently located source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway, which fact was well known to the Defendant.

[8]

IV.

That as a part of the special provisions of the specification, submitted by the Defendant, to prospective bidders, the Defendant included the following provisions:

“-2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 mile right of Station 870 and rock for crushing is available approximately 0.3 mile right of Station 1239. Unless other specifically approved in writing by

the Engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer."

V.

That Plaintiff obtained from the Defendant a copy of said invitation or call for bids, together with a copy of the plans and specifications, and examined the site of the project, and based upon the representation of the Defendant as hereinbefore set forth relative to the availability of rock for crushing, Plaintiff prepared and submitted a bid or proposal to the Defendant, which said bid was accepted by the Defendant, and on or about the 27th day of May, 1937, Plaintiff and Defendant entered into a contract pursuant thereto for the performance of the work hereinbefore described.

VI.

That immediately upon notice to proceed with the work provided for by the said contract, Plaintiff moved in on the job and drilled the quarry preparatory to shooting, and during said drilling operations due to the great quantities of soft rock encountered, Plaintiff became apprehensive of the quality of the rock in the said quarry and requested the resident engineer of the Defendant to examine the quarry to determine whether or not the rock encountered was satisfactory for Defendant's purposes; that the said resident engineer made an in-

vestigation and he in turn notified the district engineer's office of the questionable [9] character of the rock encountered, and that office asked the material engineer to make a further inspection, after which inspection, Plaintiff was ordered to proceed and use the said quarry.

VII.

That Plaintiff thereupon proceeded to open up the quarry by stripping and blasting, and completed the plant setup adequate to produce the crushed rock which could be conveniently used from that setup, and after crushing about six to eight thousand tons of surfacing material, which came mostly from the outside exposure of the quarry, the engineer and inspectors of the Defendant complained about the quality of the rock which said quarry was producing, and stopped the production of further material until the district engineer's office made a further inspection and determination, which was done, and Plaintiff was again instructed to proceed and use the said quarry for the production of material; that Plaintiff proceeded to strip and blast sufficient additional rock for his estimated requirements and to crush the rock and attempted to deliver it to the project, but the material was repeatedly rejected by the inspectors of the defendant, and the resident engineer then confined the excavation to a few small pockets within the quarry, which pockets were soon exhausted, and the quarry was then rejected as totally unsatisfactory.

VIII.

That a large quantity of the material required by the specifications consisted of rock suitable for oil processing, which character of rock, due to the fracture requirements, is more economically produced from quarried rock than from gravel, and in submitting his proposal and bid, Plaintiff had determined to produce said oil rock from the quarry hereinbefore described, but defendant refused to permit the use of any of the quarried material for use as oil rock, and Plaintiff was forced to produce [10] the same by crushing gravel and to haul the same from near one end of the project over the entire project.

IX.

That after the quarry designated and made available by the Defendant was finally condemned by Defendant, Plaintiff, after considerable delay and prospecting, finally located rock approximately seven hundred and fifty feet from the original setup, from which sufficient material was produced other than the oil rock to finish the deliveries of materials from that setup, so that not too great a loss would be involved in overhaul from the gravel quarry.

X.

That the repeated rejections of materials hereinbefore described and the extra time spent in locating, shooting, and opening a new quarry, and the additional time required in hauling material from the gravel pit, and in producing the oil rock from the gravel pit delayed the Plaintiff in the perform-

ance of his contract, and had such delays not been encountered, said work would have been completed by October 15, 1937, but due to the said delays, the Plaintiff's contract could not be completed before the winter of 1937, and work was necessarily shut down during the said winter and Plaintiff was required to return to the job in the spring and summer of 1938, and complete the same.

XI.

That although the delay in the performance of the said contract was directly attributable to the breach of contract by the Defendant in failing to furnish an adequate quarry as set out in the specifications, nevertheless Defendant assessed against Plaintiff a penalty for delay in completion in the sum of \$1575.00 and deducted said amount from the amount earned by Plaintiff under his contract. [11]

XII.

That due to the failure of the quarry as hereinbefore described, Plaintiff was compelled to open a substitute quarry and in so doing incurred an extra cost in opening and operating the said substitute quarry in the sum of \$2490.40, and in addition thereto, incurred an extra cost of overhead and superintendence in the sum of \$660.10.

XIII.

That due to the said breach of contract of Defendant, Plaintiff incurred an extra cost of the hauling of oil rock and oil maintenance rock of \$956.48.

XIV.

That in producing oil rock from the gravel pit from which Defendant wrongfully required its production, as hereinbefore alleged, Plaintiff incurred an extra and additional expense of \$4945.92.

XV.

That due to the delay in completion directly attributable to the failure of the rock quarry, as hereinbefore described, Plaintiff was required to return in the year 1938 and complete his contract and was directed and required by the Defendant to reprocess and reshape work theretofore done during the year 1937, and in so doing incurred an extra and additional expense of \$2850.17, which would not have been required except for the said breach of contract by the Defendant.

XVI.

That due to the soft material in the rock quarry furnished by Defendant, Plaintiff's roll crushing equipment repeatedly broke down and Plaintiff was compelled to spend the sum of \$1029.63 in making repairs, which would not have been necessary had the rock in the quarry been sound, tough and durable. [12]

XVII.

That Plaintiff had available on the job and was using oiling equipment which he had rented in the year 1937 and due to the inability to finish the oiling in 1937 Plaintiff was required to return this equipment to Portland, Oregon, and again in 1938 to re-

rent the equipment and ship it to the job and return it at the close of the job. That the additional cost of freight is the sum of \$487.02.

XVIII.

That Plaintiff finally completed reshaping and resurfacing the said highway, and his contract was accepted as complete by the Defendant in the month of August, 1938, and final payment of the amount determined to be due Plaintiff by the Government was made to him in the month of January, 1939, and on January 18, 1939, Plaintiff presented to the Defendant, through its District Engineer, B. H. Sweetzer, of the United States Department of Agriculture, Bureau of Public Roads, at San Francisco, California, his claim and demands for damages hereinbefore set forth, but Defendant has refused to pay the same or any part thereof.

Wherefore, Plaintiff prays for a judgment against the Defendant in the sum of Ten Thousand (\$10,000) Dollars.

/s/ J. L. LICHTY

Attorney for Plaintiff.

Service copy received July 19, 1944.

/s/ Marie Drumeff

[Endorsed]: Filed July 20, 1944. [13]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

I.

AGREED FACTS

1.

This Court has jurisdiction within the meaning of the Tucker Act, and the plaintiff is a resident of the State of Oregon.

2.

On or about the 28th day of April, 1937, acting through the Bureau of Public Roads, the United States Department of Agriculture issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lassen National Forest Highway, Shasta National Forest, Siskiyou and Shasta Counties, California; upon request, the defendant submitted to prospective bidders plans and specifications prepared by the defendant upon which bids were required to be based; the proposed project covered a distance of 16.16 miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway; as a part of the special provisions of the specifications submitted by the defendant to prospective bidders was the following provision:

“-2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 miles right of Station 870, and rock for crushing is available approximately 0.3 mile right of Station 1239. Unless otherwise especially approved in writing by the engineer, only materials from [14] the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer.”

3.

Plaintiff obtained from the defendant a copy of the invitation for bids, together with a copy of the plans and specifications, and examined the site of the project. Plaintiff prepared and submitted a bid to the defendant, which was accepted by the defendant, and on or about May 27, 1937, plaintiff and defendant entered into a contract pursuant thereto for the performance of the work hereinbefore described.

4.

Plaintiff received notice by telegram dated June 7, 1937, to proceed with the construction within ten days thereof, and some time thereafter moved in Plaintiff's equipment for the purpose of drilling the quarry. Plaintiff drilled coyote holes in the quarry, approximately .3 mile right of Station 1239, and during the preparation of these coyote holes soft rock was encountered and the resident engineer of the plaintiff made an investigation and he in turn notified the United States District Engineers Office

at San Francisco and the representative of the said District Engineers Office visited the quarry, examined the rock as disclosed by the holes drilled up to that time and determined that the quarry was adequate and suitable for the production of material required by the plans and specifications, and plaintiff proceeded with shooting and opening the quarry. The plaintiff proceeded to work on the quarry and set up his crushing plant and produced a portion of the crushed rock needed for the construction and the government inspectors complained that the rock being produced by the plaintiff did not meet contract grading specifications, after which the District Engineers Office made a further inspection of the quarry and again determined that the quarry was adequate to produce satisfactory material and plaintiff thereupon stripped and blasted the quarry to produce the material for the performance of his contract. That on September 4, 1937 [15] plaintiff was told by Joseph E. Wood, Resident Engineer in charge, that the rock in quarry at station 1239 was not good enough for cover material but that plaintiff could use rock 400 feet beyond plant for cover material. That on September 13, 1937, plaintiff moved to face number 2, approximately 450 to 700 feet from the original face. That plaintiff produced the cover material necessary for the job from station 870.

5.

The contract time within which plaintiff was required to complete his contract would expire on

October 20, 1937. Plaintiff did not complete his contract by October 20, 1937, and unsatisfactory weather developed shortly thereafter making it impossible for further work upon the project and on November 5, 1937, plaintiff moved out his equipment and shut down the job.

6.

On June 16, 1938, defendant gave notice to plaintiff to proceed to complete his contract and plaintiff began operations on June 20, 1938, and completed his contract on August 21, 1938. The overrun in contract time resulted in a claim being presented on January 18, 1939, to the District Engineer, who denied the claim on June 15, 1939. Plaintiff appealed the claim to the Commission of Public Roads, Washington, D. C., on May 13, 1941, and the commissioner refused to consider the ruling of the District Engineer because plaintiff had not appealed within thirty days as provided by Article 15 of the contract.

7.

This case is to be tried in two parts, the first part liability and the second part the amount of damage.

II.

CONTENTIONS OF THE PARTIES

1.

Contentions of Plaintiff

(a) That upon receipt by the plaintiff of the notice to proceed with construction, Plaintiff, to-

gether with the Superintendent, [16] drove to the operation site and conferred with the representative of the defendant and immediately thereafter moved in plaintiff's equipment for the purpose of drilling the quarry.

(b) That the engineer of the defendant was present and designated the point at which the quarry should be drilled and opened.

(c) That preparatory to opening and operating the quarry plaintiff drilled coyote holes which was the customary and usual manner of opening and preparing a quarry of this character and in conformity to good contracting practice.

(d) That upon drilling the coyote holes soft rock was encountered and plaintiff became apprehensive of the quality and suitability of the rock in the quarry and requested the resident engineer of the defendant to examine the quarry to determine whether or not the quarry was satisfactory for defendant's purpose.

(e) That defendant through its engineers and representatives refused to permit plaintiff to use any of the material produced from the said quarry for oil rock (cover material), stating that there was too much soft rock in the aggregate produced by plaintiff, and plaintiff after some prospecting located a source of rock approximately 750 feet from the quarry which he had first opened up and plaintiff stripped and opened that quarry and began to produce aggregate from said source, but again defendant's engineers refused to permit him to use the aggregate from such new source for the use of

making oil rock and plaintiff was required to produce all of the oil rock used at the gravel pit located at or near Station 870; that the character of the material in both the first and second locations near station 1239 was too soft for the operation of the crushing equipment ordinarily and customarily used in a rock quarry and hampered the rate of production of crushed rock and caused repeated breakdowns of the crushing equipment.

(f) Plaintiff had shaped and cleaned the gutters constructed during the year 1937 before shutting down that year and during the winter when operations were shut down slides and raveling caused the [17] gutters to become partly filled up and the resident engineer required plaintiff to clean them in his operations in the year 1938. In addition to cleaning the gutters plaintiff was required to reprocess and reshape work which had been completed and accepted during the year 1937 which would not have been required had the contract been completed before the winter of 1937.

(g) That the failure of the quarry designated by Section -2.2 of the contract to produce satisfactory material was inherent in the nature of the material in the quarry, and that Section -2.2 of the contract was a warranty that satisfactory material could be produced therefrom, and that the quarry located at or near Station 1239 would produce satisfactory material for all of the work required under the contract.

(h) That plaintiff is entitled to damages as a re-

sult of such breach, and defendant is liable to plaintiff therefor.

(i) That defendant broke its contract with plaintiff, and that the breach resulted in plaintiff failing to complete the contract on time, and that the act of the defendant in assessing damages for failure to complete on time was a breach of contract by the defendant.

(j) That the additional cost of shaping work done during the year 1937 and the cleaning of the gutters, due to slides occurring during the winter of 1937, and the cost thereof, is directly attributable to the breach of contract by the defendant, and plaintiff is entitled to damages measured by the additional cost of doing such work.

2.

Contentions of Defendants

(a) The case should be postponed pending the return to the Continental United States of Joseph E. Wood, resident engineer of the said project;

(b) Failure of plaintiff to appear to the Commissioner of Public Roads from the ruling of the District Engineer within the time specified in Article 15 of the contract is a bar to this action; [18]

(c) That no preliminary work was started at the quarry until June 29 and no crushed rock was produced and placed on the road until August 9, due to Plaintiff's negligence and delay in getting men to work, failure to press with all possible speed the opening and the development of the quarry and delay in the arrival and complete installation of his

crushing plant including crushers, power units, rollers, conveyors, weighing scales, etc.

(d) That the engineer of the defendant did not designate the point at which the quarry should be drilled and opened.

(e) That it was not necessary for the plaintiff to drill coyote holes and defendant had no control and did not attempt to assert control over the method of producing the rock. Plaintiff selected this method for his own convenience.

(f) That the resident engineer requested an inspection by the district materials engineer because stratas of soft rock were found in the deeper portions of the quarry during the coyote tunneling operation. The materials engineer found that these soft stratas did not contain detrimental material but because the soft rock would break down in crushing it would produce an excess of fine material in the crusher product unless some segregation was made in the soft rock. He advised the plaintiff's superintendent that his proposed method of coyote hole shooting would admix the soft and hard rock and make the segregation difficult and *advised* that loading of the material be done with a power shovel in order that segregation would be made. The materials engineer did not direct the plaintiff to proceed with shooting and opening the quarry.

(g) Plaintiff opened a second face of the quarry adjacent to Station 1239 on or about September 11, 1937, after obtaining approximately 15000 tons of crusher run top course from the first face and after his methods of operation had so admixed soft and

hard rock at this face as to make segregation difficult. Rock for the production of crusher run top course was thereafter obtained from both faces until September 18. [19] On September 18 the shaft of the roll crusher broke and plaintiff elected to move his crushing plant to the source adjacent to Station 870 and obtain the balance of the crusher run top course and all of the cover aggregate from that source. This move was not made because of rock shortage in the quarry at Station 1239 as ample rock was available there. It was made because the plaintiff had obtained approximately all of the crusher run top course he desired from that source and he elected to conserve time by moving while the plant was broken down pending arrival of replacement parts.

(h) It is the government's contention that no crushed material was ever rejected because of quality, or that plaintiff was ever barred from using the quarry material. Material was rejected only because the crushed product did not meet requirements for grading as it contained an excess of fine particles. This difficulty could have been avoided by proper segregation of materials in the pit. The quality of rock at Station 1239 was not the cause of rejection, but method of operation caused failure to meet contract grading requirements. No prohibition was made against the material being obtained from the first face until plaintiff had produced 15,000 tons of crusher run top course, and by his method of operation had then so admixed the softer and harder rock as to make segregation of

these impracticable. Plaintiff was then told by Joseph E. Wood, Resident Engineer, on September 4, 1937, that it would be impracticable for him to produce satisfactory cover material from the first face. No prohibition ever was made against cover material being obtained from the second face and plaintiff could have obtained the material from this face at any time had he so desired. Plaintiff moved his crushing plant from the quarry at Station 1239 before producing the cover aggregate and produced the cover material from the source at Station 870 for his own convenience in order to conserve time. Defendant made no requirement that the cover material should be produced from the source at Station 870.

(i) Defendant did not warrant quantity or quality of rock at sites designated in the contract; on the contrary, plaintiff assumed the risks concerning the quantity and quality of rock at the designated sites, and the responsibility of producing a properly graded crushed product therefrom. [20]

(j) Plaintiff received all rock from sources designated in the contract; the so-called new quarry was not a change of site, but "Within approximately 0.3 mile right of Station 1239," as provided in Section -2.2 of contract;

(k) Assuming that the court finds that the so-called new quarry is a change of site and not within the contract provision "approximately 0.3 mile right of Station 1239," plaintiff cannot claim breach of contract, since he did not exhaust the other

sources specified in the contract before beginning operations at the third site;

(1) Plaintiff's inability to complete the contract on time resulted from his failure to recognize time as the essence of his contract and his delay in developing the quarry at Station 1239 and in completing his crushing plant assembly and installation. He permitted fifty percent of the contract time to elapse before he produced and placed any crushed rock on the road.

(m) That the defendant does not know whether the plaintiff did or did not shape and clean the gutters in the fall of 1937, but if he did that was not a satisfaction of the contract requirements, since the contract required the gutters to be shaped and cleaned at the completion of the project, and no section of the project was completed and accepted during 1937; and defendant contends that plaintiff was not required to reprocess and reshape work which had been completed and accepted during the year 1937 or to do any work not required by the contract.

III.

QUESTIONS TO BE DETERMINED

It is agreed that the contract time was over-run and that this was the cause of some of the damage plaintiff suffered. The problem is what caused the over-run and who is legally responsible for it.

The second problem is whether or not the quarry approximately 0.3 mile right of Station 1239 was a suitable quarry for producing the material re-

quired for the performance of the contract, and whether or not it was [21] so warranted by the defendant. The questions to be determined are:

1. Did plaintiff begin productive operations within a reasonable time after receiving notice to begin operations? And if not, was the neglect to do so a material factor in causing the contract to overrun?

2. Did defendant's agents direct the plaintiff in the method of operation such as which source to begin operations, the particular spot in the source to begin, the drilling of coyote holes and the type of equipment used?

3. Did plaintiff attempt to produce cover material from either face 1 or 2 at Station 1239?

4. If he did, was it rejected by the defendant?

5. Assuming that it was rejected, was the rejection the result of the plaintiff's method of operation or was the rock inherently defective?

6. If the rock is determined to be inherently defective, did the defendant warrant by section -2.2 of the contract the quality and quantity of the rock at the designated sources?

7. If the defendant did so warrant, can the plaintiff avail himself of the warranty without first exhausting both of the designated sources?

8. If so, was the 2nd site a source not designated in Section -2.2 of the contract or was it within .3 mile right of Station 1239?

9. Is Joseph E. Wood, Resident Engineer of the said project, an indispensable witness?

10. Is plaintiff barred from this action because he did not strictly follow Article 15 of the contract?

(a) Does Article 15 apply to both questions of law and questions of fact? [22]

(b) If Article 15 applies only to questions of fact, is plaintiff's case the claim that defendant's agents acted erroneously on a question of fact?

IV.

EXHIBITS

At said pre-trial conference the following pre-trial exhibits were offered and marked by the reporter, and in each instance both parties agreed that said exhibits were admissible in evidence.

Plaintiff's Pre-Trial Exhibits

No. 1. Photograph of original quarry.

No. 2. Photograph of original quarry.

No. 3. Photograph of original quarry.

No. 4. Photograph of original quarry.

Defendant's Pre-Trial Exhibits

No. 5. Photostatic copy of Bid, Contract, and Bond for Forest Road Construction, this photostatic copy being under the seal of Philip B. Fleming, Federal Works **Administrator**.

No. 5a. General Specifications FR50-1035 for Forest and Park Road Construction.

No. 6. Photostatic copy of letter dated June 7, 1937, addressed to Homer G. Johnson, signed by N. L. Wilson, Acting Secretary, Department of Agriculture, notification of acceptance of proposal.

No. 7. Telegram dated June 7, 1937, addressed to Homer G. Johnson, notice to start operations within ten days.

No. 8. Letter dated June 30, 1937 signed by Homer G. Johnson, acknowledging receipt of instructions to proceed with this project.

No. 9. Letter dated July 14, 1938, addressed to Homer G. Johnson, signed C. N. Sweetser, being Change Order No. 1.

No. 10. Letter dated October 1, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, temporary suspension of construction.

No. 11. Letter dated October 4, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction. [23]

No. 12. Letter dated October 15, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to temporarily suspend construction.

No. 13. Letter dated October 16, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction.

No. 14. Letter dated November 5, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to temporarily suspend all construction.

No. 15. Letter dated June 13, 1938, addressed to Homer G. Johnson, signed by Joseph E. Wood.

No. 16. Letter dated June 20, 1941, addressed to Homer G. Johnson, signed by C. D. Curtice, Acting Commissioner of Public Roads, refusing consideration of Johnson's claim.

No. 17. Letter dated May 13, 1941, addressed to Public Roads Administration, signed by Homer G.

Johnson, asking consideration of his claim previously presented to District Engineer's Office, San Francisco, California.

No. 18. Letter dated June 15, 1939, addressed to Homer G. Johnson, signed by C. N. Sweetser, District Engineer, denying claim submitted by Johnson, consisting of six pages.

No. 19. Letter dated January 18, 1939, addressed to C. N. Sweetser, District Engineer, signed by Homer G. Johnson, presenting claim of Johnson, consisting of twenty-four pages.

No. 20. The original diary kept by Joseph E. Wood of daily events concerning the involved project.

No. 21. Original Daily Report for Crushed Rock Surfacing, kept by Joseph E. Wood, of the involved project.

No. 22. Plan and Equipment Questionnaire, executed by Homer G. Johnson, concerning the involved project.

No. 23. Vicinity map of quarry site with photographs attached.

No. 24. Photograph view of easterly edge of face No. 1 of Johnson Quarry. [24]

No. 25. Photograph view of old quarry near highway containing rock similar to that in Johnson Quarry.

No. 26. Photograph view of face No. 1 of Johnson Quarry before shooting by Johnson.

No. 27. Photograph view during operations at face No. 2 of Johnson Quarry.

No. 28. Photograph view of plant in operation at face No. 1 of Johnson Quarry.

The court finding that the foregoing clearly and accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings and does hereby order that said pre-trial order be, and it is hereby, incorporated into and made a part of the record of this case for the purpose of controlling the course of proceedings on the formal trial hereof.

Dated at Portland, Oregon, this 11th day of April, 1944.

CLAUDE McCOLLOCH

District Judge

/s/ J. L. LICHTY

of Attorneys for Plaintiff

/s/ WILLIAM M. LANGLEY

of Attorney for Defendant

[Endorsed]: Filed April 11, 1944. [25]

[Title of District Court and Cause.]

MEMO OF DECISION

In the view I take, there was no dispute as to a question of fact, requiring submission to the contracting officer and appeal to the head of the Department. Rather, the dispute is over interpretation

of the contract,¹ and the effect on the obligations under the contract of the disclosure that the quarry did not contain good rock.

The case may proceed to trial of the damages. I recognize that there may be some difficulty in determining what portion of the contractor's damages are properly chargeable to the quarry.

Dated April 21, 1944.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed April 21, 1944. [26]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action coming on regularly for trial before the court without a jury, and the court having first tried the issue as to the question of breach of contract and liability and having thereupon entered an interlocutory findings of fact, and thereafter having heard the evidence adduced by the parties relative to damages sustained by plaintiff and both parties having rested,

Now, Therefore it does hereby make and enter the following findings of fact and conclusions of law:

¹ I will amplify this in the Findings.

FINDINGS OF FACT

I

This court has jurisdiction within the meaning of the Tucker Act, and the plaintiff is a resident of the State of Oregon.

II

On or about the 28th day of April, 1937, acting through the Bureau of Public Roads, the United States Department of Agriculture issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 55, Mt. Shasta-Mt. Lassen National Forest Highway [27] Shasta National Forest, Siskiyou and Shasta Counties, California; upon request, the defendant submitted to prospective bidders, plans and specifications prepared by the defendant upon which bids were required to be based; the proposed project covered a distance of 16.16 miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway, as a part of the special provisions of the specifications submitted by the defendant to prospective bidders was the following provisions

“-2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 miles right of Station 870., and rock for crushing is available

approximately 0.3 miles right of Station 1239. Unless otherwise especially approved in writing by the engineer, only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer."

III

Plaintiff obtained from the defendant a copy of the invitation for bids, together with a copy of the plans and specifications, and examined the site of the project. Plaintiff prepared and submitted a bid to the defendant, which was accepted by the defendant, and on or about May 27, 1937, plaintiff and defendant entered into a contract pursuant thereto for the performance of the work hereinbefore described.

IV

Plaintiff received notice by telegram, dated June 7, 1937, to proceed with the construction within ten days thereof, and some time thereafter moved in plaintiff's equipment for the purpose of drilling the quarry. Plaintiff drilled coyote holes in the quarry, approximately 0.3 miles right of Station 1239, and during the preparation of these coyote holes soft rock was encountered and the resident engineer of the defendant made an [28] investigation and he in turn notified the United States District Engineers office at San Francisco and the representative of the said District Engineers Office visited the quarry, examined the rock as disclosed by

the holes drilled up to that time and determined that the quarry was adequate and suitable for the production of material required by the plans and specifications, and plaintiff proceeded with shooting and opening the quarry. The plaintiff proceeded to work on the quarry and set up his crushing plant and produced a portion of the crushed rock needed for the construction and the government inspectors complained that the rock being produced by the plaintiff did not meet contract grading specifications, after which the District Engineers Office made a further inspection of the quarry and again determined that the quarry was adequate to produce satisfactory material and plaintiff thereupon stripped and blasted the quarry to produce the material for the performance of his contract. That on September 4, 1937, plaintiff was told by Joseph E. Wood, Resident Engineer in charge, that the rock in quarry at Station 1239 was not good enough for cover material, and plaintiff thereafter prospected for a new quarry in that vicinity and uncovered a new quarry approximately 450 feet from the old quarry and drilled and blasted that rock and loaded and hauled rock from the new quarry to the crusher in the old quarry, and produced some additional base cover material from this source, but after approximately ten days operation the soft rock from the new quarry began interfering with production and due to the excess soft rock a shaft roll in the crusher broke on the 18th day of September, 1937, and the contractor ceased operating at both of the quarries near Station 1239

and moved his crushing plant and equipment to the gravel pit at or near Station 870.

V

That thereafter plaintiff produced and spread upon the highway all of the surfacing material necessary to complete [29] the roadway, but unsatisfactory weather developed shortly thereafter making it impossible to complete the armor surface for the roadway, consisting of a mixture of oil and rock chips, and the defendant notified the plaintiff to shut down the job until notified to proceed to complete it in the next year when the weather would permit its completion.

VI

That due to the unsatisfactory material in the quarry designated by the government, approximately 0.3 of a mile right of Station 1239, it was impossible for the plaintiff to produce the rock chips necessary for the armor surface cover material from that quarry, and had there been available, in the said quarry, satisfactory material plaintiff could have produced, while crushing and spreading surface course material, enough rock chips and have had the same stock piled and available for application to the armour surface course to have enabled him to have completed the southerly half of the job from the one crusher set-up.

VII

That the specifications provided that crusher run surface course material should be crushed from

sound, tough, durable rock and should be uniform in quantity and grading, and the rock present in the quarry designated by the defendant, approximately 0.3 of a mile right of Station 1239 was neither sound, tough nor durable and plaintiff was repeatedly compelled to waste truck loads of material produced from the said quarry as not being up to specifications, and in attempting to meet specifications plaintiff was compelled to use unusual and expensive methods, and the presence of large quantities of soft rock in the quarry caused repeated breakdowns and damage to plaintiffs' equipment for which plaintiff has not been compensated.

VIII

That the failure of the government to furnish to plaintiff adequate and satisfactory quarries at the place designated in the call for bids and specifications resulted in delaying the completion of the project and made it impossible for the plaintiff to complete the project within the time limit provided in the contract and prior to the winter of 1937, and defendant assessed against plaintiff a penalty of liquidated damages in the sum of \$1,575.00.

IX

That due to the fact that plaintiff could not produce satisfactory crusher run material from the said quarry he was unable to complete the surface course material for the full southerly half of the job from the said quarry, and which required him to haul a considerable portion of the surface course mate-

rial from the gravel pit approximately .5 of a mile right of Station 870 to complete the work that he should have been able to have completed from the rock quarry set-up, causing him extra cost due to the longer haul in the amount of \$956.48.

X

That had the rock in the quarry, approximately .3 of a mile right of station 1239, been sound, tough and durable the rock chips necessary for the completion of the southerly half of the job could have been segregated from the crusher rock material and stock piled, but due to the fact that the Government Engineers refused to permit plaintiff to use any of the rock from the said quarry for rock chips or oil rock, plaintiff was compelled later to run gravel through the crusher at the gravel pit for the production of the oil chips necessary to complete the southerly half of the job, which operation would have been unnecessary had the rock quarry been as represented and warranted by the government in the specifications and call for bids. The plaintiff in his operations necessarily expended \$4618.34 in producing the rock chips or oil rock which he would not have been required to [31] spend had the rock quarry been adequate.

XI

That plaintiff had completed and shaped the roadway and gutters as the gravel and rock material was spread during the year 1937, but due to the fact he could not complete the same prior to the

bad weather in the winter of 1937, plaintiff was compelled to reprocess and reshape the same at extra and additional expense after he was permitted to resume operations in 1938, and he has not been compensated for any part of such additional expense. That the plaintiff necessarily expended the sum of \$2,850.17 in such operations.

XII

That had the rock in the said quarry, approximately .3 of a mile right of Station 1239, been sound, tough and durable rock and of the quality contemplated by the defendant and plaintiff at the time the contract was entered into, plaintiff with his equipment and crew and plan of operation would have been able to have completed his said contract within the time limited and prior to the unseasonable weather in the fall and winter of 1937.

And from the foregoing findings of fact the court does hereby make and enter the following conclusions of law.

CONCLUSIONS OF LAW

That plaintiff is entitled to judgment against the defendant for the sum of \$9,999.99.

Done In Open Court this 17th Day of Nov., 1944.

CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed November 17, 1944. [32]

[Title of District Court and Cause.]

MOTION

Comes Now William M. Langley, Assistant United States Attorney for the District of Oregon, and moves this Court for an order amending the Findings of Fact now on file in the within case, and in support of this motion states to this Court that on April 11, 1944, in accordance with the Rules of Civil Procedure for the District Courts of the United States and in accordance with the practice of this Court, a Pre-trial Order was signed by the attorneys appearing in this case and by Claude McCulloch, Judge of the United States District Court for the District of Oregon; that on Page 9 of the Pre-trial Order there are certain questions stated and are the questions agreed by the attorneys and the Court to be determined in this case; that the Findings of Fact now on file in this case do not answer the said questions, and it is the request of the United States of America that these questions either be answered or the Findings of Fact amended so that the questions are answered;

That the United States of America further moves this Court that the Findings of Fact be amended and answer the questions set out on Page 9 of the Pre-trial Order as follows:

Answer the first part of Question 1 in the negative;

Answer the second part of Question 1 in the affirmative;

Answer Question 2 in the Negative;

Answer Question 3 in the negative;

Answer Question 4 in the negative; [33]

Answer Question 5 that assuming that material was rejected that rejection was the result of plaintiff's method of operation;

Answer Question 6 by stating that the answer to Question 5 answers Question 6, but if the Court answers Question 5 that the rock was inherently defective then Question 6 should be answered in the negative;

Answer Question 7 by saying that the answer to Question 6 answers Question 7, but if the Court answers Question 6 by stating that defendant is warranted by Section -212 of the contract the answer to Question 7 should be in the negative;

Answer Question 8 by stating that the second site was within three-tenths of a mile right of Station 1239;

Answer Question 9 by stating that Joseph E. Wood is an indispensable witness;

Answer Question 10 by stating that the case of United States v. Algernon Blair, etc., decided by the United States Supreme Court on April 10, 1944, bars plaintiff from this action.

Dated at Portland, Oregon, this 13th day of November, 1944.

/s/ WILLIAM M. LANGLEY

Assistant United States

Attorney

State of Oregon,
County of Multnomah—ss.

I, William M. Langley, Assistant United States Attorney for the District of Oregon, being first duly sworn, depose and say that I have served the attached motion upon John Lichty, attorney for the within defendant, Homer G. Johnson, by depositing in the United States mail a true and correct copy of this motion in an envelope addressed to John Lichty, Attorney at Law, Failing Building, Portland, Oregon, with postage prepaid.

/s/ WILLIAM M. LANGLEY

Subscribed and sworn to before me this 13th day of November, 1944.

[Seal] /s/ FRANK L. MEYER

Notary Public for Oregon. My commission expires
May 24, 1948.

[Endorsed]: Filed November 20, 1944. [34]

[Title of District Court and Cause.]

ORDER

The motion of the United States of America dated November 13, 1944, coming on for hearing, and the Court being fully advised in the premises, It Is Hereby Ordered that said motion be denied.

Dated at Portland, Oregon, this 5th day of
December, 1944.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed December 5, 1944. [35]

In the District Court of the United States
for the District of Oregon

No. Civ. 1693

HOMER G. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above entitled action having been tried by
the Court without a jury and the court having
heretofore made and entered findings of fact and
conclusions of law, and deeming itself fully advised
in the premises,

Now, Therefore It Is Hereby Ordered, Adjudged
and Decreed that the plaintiff have and recover of
and from the defendant the sum of \$9,999.99.

Done in Open Court This 20th day of November
1944.

/s/ CLAUDE McCULLOCH

Judge

[Endorsed]: Filed November 20, 1944. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Homer G. Johnson, plaintiff above named,
and John Lichty, his attorney:

You, and each of you, will please take notice
that the defendant, United States of America,
appeals from that certain judgment in the above-
entitled cause made and entered the 20th day of
November, 1944, by the Honorable Claude McCol-
loch, Judge of the above-entitled court, wherein the
plaintiff recovered judgment against the defendant
in the sum of \$9,999.99.

CARL C. DONAUGH

United States Attorney for the District of Oregon

By J. MASON DILLARD

Asst. United States Attorney

Of Attorneys for Defendant

United States of America

District of Oregon—ss.

Due and legal service of the within Notice of
Appeal is accepted in the State and District of
Oregon this 17 day of February, 1945, by receiving
a copy thereof duly certified to as such by Mason
Dillard, Assistant United States Attorney for the
District of Oregon, of attorneys for defendant.

/s/ J. L. LICHTY

Attorney for Plaintiff

[Endorsed]: Filed February 17, 1945. [37]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the District Court of the United States for the District of Oregon:

Defendant designates the following as the record to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of the above-entitled case, it being Defendant's intention to designate the whole record:

1. Complaint
2. Amended Complaint
3. Answer of Defendant
4. Pre-Trial Order
5. Memo of Decision
6. Findings of Fact and Conclusions of Law
7. Motion
8. Order
9. Judgment
10. Transcript of Pre-Trial Proceedings
11. Transcript of Trial Proceedings
12. Notice of Appeal
13. Designation of Record

CARL C. DONAUGH,

United States Attorney for
the District of Oregon

J. MASON DILLARD

Assistant United States
Attorney [38]

United States of America,
District of Oregon—ss.

Service of the within Designation of Record is accepted in the State and District of Oregon this 26 day of March, 1945, by receiving a copy thereof, duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

/s/ JOHN LICHTY

Attorney for Plaintiff

[Endorsed]: Filed March 26, 1945. [39]

CERTIFICATE OF CLERK

United States of America
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 40 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 1693, in which United States of America is defendant and appellant, and Homer G. Johnson is plaintiff and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct

transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of the testimony taken in this cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of March, 1945.

[Seal] LOWELL MUNDORFF,

Clerk

By F. L. BUCK

Chief Deputy Clerk [40]

In the District Court of the United States
for the District of Oregon

No. Civ. 1693

HOMER G. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Portland, Oregon, Monday, June 1, 1943

10:45 a.m.

Before:

Honorable James Alger Fee, Judge.

Appearances:

Mr. John Lichty, Attorney for Plaintiff;

Mr. William Langley, Assistant United States
Attorney, appearing for United States of
America, Defendant.

Cloyd D. Rauch, Court Reporter.

EX PARTE CONFERENCE:

The Court: You may proceed, gentlemen.

Mr. Lichty: Your Honor, this is an action brought by Homer Johnson against the United States based upon a contention of breach of contract. The Government has denied categorically [1*] every allegation of the complaint. It was served upon the Government—I think the action

*Page numbering appearing at top of page of original Reporter's Transcript.

was filed December 7th. Since that time the Local District Attorney's office has been attempting to get from the Bureau of Public Roads at San Francisco the facts in connection with the case. They have made a motion to postpone the trial, to which is attached an affidavit, but I don't think that we should postpone the shaping of the case in pretrial conference.

They have denied paragraph I, which is the jurisdictional requirement of residence of the plaintiff within this District. I am asking at this time if they contend that that is an issuable matter?

Mr. Langley: No, we will admit that the Court has jurisdiction.

Mr. Lichty: You admit the residence of the defendant within this District—or of the plaintiff, rather?

Mr. Langley: Well, yes, I suppose that we will admit that.

Mr. Lichty: Yes. And paragraph II they have denied, which is the fact "That on or about the 28th day of April, 1937, acting through the Bureau of Public Roads, United States Department of Agriculture, issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lassen National Forest Highway—that is part of the allegation the defendant admits—Shasta Nation- [2] al Forest, Siskiyou and Shasta Counties, California. That as a part of said invitation, the Defendant submitted to pros-

pective bidders plans and specifications prepared by the Defendant upon which bids were required to be based.

Are you admitting that?

Mr. Langley: Yes, we will admit that.

Mr. Lichty: Paragraph III is "That the proposed project covered a distance of approximately sixteen and one-half miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate and conveniently located source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway, which fact was well known to the Defendant."

Mr. Langley: We will admit that the district covered 16.16 miles and—we will admit the rest of that paragraph in there.

Mr. Lichty: We will accept that change in distance from 16½ to 16.16.

Paragraph IV quotes a portion of the specifications, which they have denied.

Mr. Langley: We will admit that.

Mr. Lichty: V, we allege, "That Plaintiff obtained from the Defendant a copy of said invitation or call for bids, together with a copy of the plans and specifications". That far I suppose you will admit in there. The balance of it I suppose is issuable. [3]

Mr. Langley: Let's see, how far were you down there?

Mr. Lichty: "That Plaintiff obtained from the Defendant a copy of said invitation or call for bids,

together with a copy of the plans and specifications”.

Mr. Langley: “——and examined the site of the project”—we will admit it that far.

Mr. Lichty: You will admit it that far. And the last one, two, three, four, five lines of that paragraph: “Plaintiff prepared and submitted a bid or proposal to the Defendant, which said bid was accepted by the Defendant, and on or about the 27th day of May, 1937, Plaintiff and Defendant entered into a contract pursuant thereto for the performance of the work herein before described.”

(Mr. Langley here addressed Mr. Lichty in a tone of voice inaudible to the reporter.)

Mr. Lichty: Well, your acceptance, I think, was May 27th. I think the actual signing of the contract was at a later date.

Mr. Langley: Well, we will agree to that. Now, just a minute, also, there,—we were wondering if we can agree as to the date at which work was to begin. We understand that plaintiff had notice to begin work on June 10th, 1937, and that he was to finish the work on October 7th, 1937, and then that the time was extended to October 20th, 1937; that the work was actually completed on August 2nd, 1938; that it was suspended from November 27th, 1927 to June 16, 1938, causing an overrun of sixty-three [4] days on the contract, resulting in the enforcement of liquidated damages—now, what was the sum?

Mr. Lichty: Well, of course, through a great portion of the complaint that thing comes up. Here

in paragraph VI, I merely would consider that when we come to the question.

Mr. Langley: All right.

Mr. Lichty: "That immediately upon notice to proceed with the work provided for by the said contract, Plaintiff moved in in the job and drilled the quarry preparatory to shooting"—I don't imagine that you would wish to admit that "immediately".

Mr. Langley: No.

The Court: Well, let's settle that point. When did you move in? When did you get the notice and when did you move in? You can agree on that, can't you?

Mr. Langley: We can agree on when he got the notice; probably not when he moved in, Your Honor.

Mr. Lichty: Have you the notice there, copy of the notice?

Mr. Langley: Yes.

Mr. Lichty: We will stipulate that telegram of June 7th, 1937 from the Bureau of Public Roads, addressed to Homer G. Johnson, Imperial Hotel, Portland, Oregon, directing him to proceed with construction within ten days, was received by him.

The Court: Now, when do you contend you went to work?

Mr. Langley: Your Honor, we contend that there were no productive operations on the job until August 9th, 1937. [5]

Mr. Lichty: The plaintiff will contend that on June 20th they went onto the job and commenced.

The Court: Well, that, apparently, is a question of fact, then. Can you give a schedule as to your operations, and do you have anybody that can check that?

Mr. Langley: Your Honor, our man, who is in the Army, made a diary, a daily diary. We have that here and intend to offer it as an exhibit.

The Court: Well, you might as well show it to Mr. Lichty right now.

Mr. Langley: Yes.

The Court: Maybe if he reads it over, why, you can agree to it. That will probably take a detailed examination, and under the circumstances it won't be necessary for the Court to remain on the bench while you are reading it. Call me when you are ready.

(A recess was thereupon had, after which pre-trial conference was resumed as follows:)

Mr. Lichty: Your Honor, on the question of when we proceeded with the work provided in the contract, we are contending that we commenced on or before June 20th. There are two days in there that we are not quite certain of, but he was on the job, starting, on or before June 20th. The Government, of course, denies that.

Mr. Langley: Yes, it says, "Plaintiff moved in on the job [6] and drilled the quarry preparatory to shooting". Our contention is that the first holes were drilled on July 6th. Now, the rest of that, we will admit that the question of soft rock was involved. We haven't any record in our diary of

Captain Wood about a conversation about soft rock, but we admit that someone called the District Engineer's office and Mr. Steele visited the quarry and there was some discussion between Mr. Steele and the Resident Engineer and the contractor's superintendent, and the agreement was reached that the quarry was satisfactory and the work proceeded. We deny that the plaintiff was ordered to proceed. Does that cover that?

Mr. Lichty: Well, of course, that is their contention. I would like very much, your Honor, in view of the answer that they filed, to have them amend their answer before this pre-trial order is drawn, because their answer is evidently not an answer at all.

The Court: No, I have no feeling about that at all. I can settle these facts just as well now, as to how much they are going to admit and how much they are going to deny. If there is anything in that that you don't think——

Mr. Lichty (Interrupting): In these fast-running admissions I don't quite get all the purport, that is all, when they say that an agreement was reached that the quarry was satisfactory, because there was no such agreement. We were contending all the time that it was unsatisfactory, that was our [7] contention, and they directed us to proceed.

The Court: Well, you can be more specific. Take it a clause at a time. "Plaintiff moved in on the job and drilled the quarry preparatory to shooting". He claims the first shooting was done on

July 6th, and, as I understand it, you contend to the contrary.

Mr. Lichty: We contend that it was before July 6th. We don't know the identical date, but somewhere between the 20th of June and the date that they set down.

The Court: " * * * and during said drilling operations due to the great quantities of soft rock encountered"—I understand there is no doubt about that, that there was some soft rock encountered?

Mr. Lichty: That is right.

Mr. Langley: Yes.

The Court: Now, then, " * * * Plaintiff became apprehensive of the quality of the rock in the said quarry": Now, how about that? Is that admitted or denied? Does the Government admit or deny that, or do you say you don't know?

Mr. Langley: Well, I think we ought to admit, your Honor, that the question of soft rock was raised at that time. We don't know anything about whether he was apprehensive. That is a conclusion.

Mr. Lichty: Well, the plaintiff did raise it.

Mr. Langley: Yes. [8]

The Court: And due to a request of some sort, emanating, I take it, from the plaintiff, the Resident Engineer of the defendant did examine the quarry?

Mr. Langley: Now, our complication there is there is that the Resident Engineer is the man in the Army and he has nothing in his diary about it, so we are not prepared to make a statement on that.

The Court: All right, that is denied and is an issue. Now, who notified the District Engineer's office? Do you know about that? They are claiming that it was done by the Resident Engineer.

Mr. Langley: Well, it was either the contractor or the Resident Engineer. We will admit that the District Engineer's office was notified.

The Court: Of the questionable character of the rock in controversy?

Mr. Langley: Yes.

The Court: And that office, that is, the District Engineer's office, asked the material engineer to make a further inspection?

Mr. Langley: That is correct, your Honor.

The Court: After the inspection, the plaintiff did proceed and use the quarry. It is a question of fact as to whether he was ordered to do it or it was done by agreement.

Mr. Langley: Correct, your Honor. [9]

The Court: All right. Now, then, the plaintiff opened the quarry by stripping and blasting?

Mr. Langley: Yes, your Honor, that is correct.

The Court: “* * * and completed the plant set-up adequate to produce the crushed rock”?

Mr. Langley: Yes, we admit that.

The Court: And if it had been proper rock it could have been completely used from that setup?

Mr. Langley: No, we deny that.

The Court: Now, then, I don't see your theory. Why do you deny that? It would seem to me that that would be—

Mr. Langley: All right, perhaps I am mistaken. I didn't quite understand. We will admit—

The Court: Crushed rock, if it had been good crushed rock suitable for using on the road it could have been conveniently used from that setup. Of course, I understand you are not admitting anything about it being improper, or anything of that sort.

Mr. Langley: You see, what caused me to hesitate is the phrase in there "if it had been proper rock". We don't admit anywhere that the rock wasn't proper.

The Court: No, that is what I understand.

Mr. Langley: Yes.

The Court: Let's say this: That rock could have been conveniently furnished from that setup for this road. [10]

Mr. Langley: Yes, that is correct.

The Court: All right. That contains no indication, then, as to the kind of rock it was.

Mr. Langley: No.

The Court: Did the plaintiff then crush or not six or eight thousand tons of rock, of surfacing material?

Mr. Langley: We claim thirteen thousand.

Mr. Lichty: From that setup?

The Court: Plaintiff crushed thirteen thousand from that setup,—will you accept that?

Mr. Lichty: Not from that setup, no, your Honor.

The Court: There is a question of fact, then, as to how much was crushed in the setup. Now, how about the next phrase, that this rock that was

crushed came mostly from the outside exposure of the quarry?

Mr. Langley: We deny that, your Honor.

The Court: All right. Now, then, that the engineer and inspectors of the United States complained about the quality of the rock which the quarry was producing?

Mr. Langley: Yes.

The Court: Why did you complain?

Mr. Langley: Because the grade didn't meet our standard.

The Court: The grade?

Mr. Langley: The grading of the material didn't meet the specifications in the contract. [11]

The Court: It wasn't on account of the quality of the rock?

Mr. Langley: That is correct.

The Court: All right. Did the United States then stop further production, the production of further material?

Mr. Langley: No, we deny that, your Honor.

The Court: Did they make a further inspection?

Mr. Langley: No. We state, in reply to that, that an inspection was made but it wasn't made at the request of the plaintiff.

The Court: Further inspection was made, but was not made at the request of the plaintiff. All right. That seems to be a square confession of avoidance.

Mr. Lichty: We don't contend in there that it was made at our request.

The Court: Well, I think that they have a right to state the qualifications, and if that is the qualification that they want to state I don't think anybody should object to it. Did you instruct plaintiff to proceed and use the quarry for the production of material then?

Mr. Langley: Our position is that we simply permitted him to; we didn't instruct him or order him.

The Court: All right. Then "plaintiff proceeded to strip and blast sufficient additional rock for his estimated requirements". Is that where the thirteen thousand comes in?

Mr. Lichty: That is where our contention comes in, that there was thirteen thousand up to the time that we asked for that [12] additional inspection.

The Court: All right.

Mr. Langley: We say, in reply to that, that there was an additional seven thousand, making a total of twenty thousand up to this point.

The Court: I see. And they thereupon attempted to deliver the rock on the project, and that the rock was rejected by the inspectors of the defendant repeatedly.

Mr. Langley: Our position on that, your Honor, will have to be this, that we have no record from our resident engineer, who is in the service, any person, as to this specific objection, but we will admit that periodically the rock was rejected.

The Court: And why?

Mr. Langley: Because it did not meet the grading requirements provided in the contract.

The Court: But there was no objection taken to the quality of the rock itself.

Mr. Langley: Not for this particular crusher.

The Court: Now, did the plaintiff, then, at the order of the resident engineer, confine the excavation to a few small pockets, which pockets were soon exhausted and the quarry was then rejected as totally unsatisfactory?

Mr. Langley: We are unable, because of the absence of our witness, to state whether the excavation was confined to a few small pockets and that these were soon exhausted, but we deny [13] that the quarry was rejected as totally unsatisfactory.

The Court: I will take up paragraph VIII, now, in that same manner.

Mr. Lichty: Are you considering paragraph VIII?

Mr. Langley. I am waiting for the Court.

The Court: No, I told you to go ahead and take up paragraph VIII and specify, deny or admit.

Mr. Langley: Oh, excuse me. We will deny paragraph VIII and state as our position that the plaintiff was warned that the material that he was taking or using for rock suitable for oil processing would be rejected.

The Court: Now, because of the rejection of the product did he have to find a new quarry?

Mr. Lichty: Before you start that, there is one correction I want to make in my allegation here. My client has told me that they were forced to make an additional haul from a rockquarry at the new source to his crusher of about fifteen hundred feet.

I misunderstood him and said that the rock was located about fifteen hundred feet from the original setup. It is just half of that haul, so the rock located, he says, was approximately seven hundred and fifty feet from the original setup.

Mr. Langley: That is in paragraph IX.

The Court: Yes.

Mr. Langley: We haven't finished with paragraph VIII yet. [14]

Mr. Lichty: I thought you had.

Mr. Langley: Mr. Reporter, we would like to strike out what we have already said about paragraph VIII and just deny it.

The Court: Well, as I understand, you did refuse to permit the use of part of the quarried material on the road, did you not?

Mr. Langley: How is that?

The Court: You have already said that in connection with VII.

Mr. Langley: In further qualification of our denial, we will admit that we denied to accept certain portions of soft rock as not being suitable for oil process.

The Court: Did plaintiff then open a new quarry?

Mr. Langley: Our position in that is that he opened a new face within the quarry about four hundred feet from the original face. That comes up in paragraph IX.

The Court: Well, I shouldn't think you would be in disagreement about that. I should think that distance—

Mr. Langley: About the distance?

The Court: You ought to be able to measure the distance.

Mr. Langley: Well, we did measure it.

The Court: Well the two of you ought to be able to measure it together and find out. There ought to be no question about distances. Have you a map of the locality?

Mr. Langley: We haven't a map available now, your Honor.

Mr. Lichty: My client says that in an air line it was [15] probably about five hundred feet, but the actual distance that the trucks traveled to and from was seven hundred and fifty feet.

The Court: If you are going to have to put proof in on each side on this question of the distances, the easiest way is to find out first and get an agreement. There ought not to be any question about how far a certain distance it. I don't see that there ought to be any debate about that at all.

Mr. Lichty: It is physically marked on the ground—

Mr. Langley: (Interrupting) All right, we will agree that it is approximately five hundred feet, although we measured it and it measured four hundred on our measurement. Apparently the plaintiff has never measured it; he has come down from fifteen hundred to five hundred.

Mr. Lichty: Well, he said that seven hundred and fifty feet was the distance that his trucks had to travel from one setup to the other, but the air

line is probably about five hundred. He never measured the air line.

Mr. Langley: We will agree that it is approximately five hundred. That will simplify it.

Now, so far as paragraph X is concerned, we deny that the quarry difficulty was the cause of the contract running over, and our contention is that the contractor ran over because of his failure to begin productive operations within a reasonable time after he was ordered to do so by the District Engineer under the contract, and we, so far as the dates are concerned there, we will admit that the contract was to be finished on October [16] 20th, 1937,—

The Court: It says 15th.

Mr. Langley: Well, we will go five days farther than that, October 20th, 1937; that it was suspended during the winter, from November 4th, 1937 to June 16th, 1938, and that the contract was finished on August 2nd, 1938, causing an overrun of sixty-three days, for which the contractor was assessed liquidated damages of \$1575. That takes in both X and XI.

Now, so far as XII is concerned, we deny that the defendant was ever compelled to open a substitute quarry. We admit that a new face was opened, but we claim it was a new face within the original quarry and was not a change of site within section of the contract -2.2 "Sources of Supply".

Now, as to VIII, we deny that there was a breach of the contract. Of course, that includes the rest.

Mr. Lichty: Well, will you admit that if there

is a breach of contract that those expenses were properly incurred?

Mr. Langley: No, we would be unable to do that.

The Court: Well, do you know what those expenses are?

Mr. Lichty: We submitted to the Department at San Francisco, at the close of the job, an itemized statement of them, which they have had ever since.

Mr. Langley: Yes, we have that, your Honor. We will introduce that as an exhibit. However, we are not prepared to admit the correctness of the claim. [17]

The Court: Well, could you admit that there was a certain amount additional expense that was caused by the delay, without admitting the fault, if any?

Mr. Langley: No, sir, nothing within the normal expectancy of that operation.

The Court: Well, in other words, you don't think that it was any more expensive?

Mr. Langley: No. In fact, we may be prepared to make a showing that it was cheaper to do that than to continue in the original faces. We do not want to make any admissions along that line, but that is the position that we are in, that we don't think there was any additional expense.

Mr. Lichty: I think we have agreed on that, that if we would try to produce it from the original quarry we probably never would have got done, that they probably never would take the rock, they

would reject it. I think we have agreed upon that, that it would cost us less to go over and open it up than it would have to continue on with the original quarry.

Mr. Langley: You see, here is the position we are in, we can't admit that this was a new quarry; we claim that it was within the source specified in the contract, so it is difficult for us to admit, then, that there would have been an additional expense in going from the one face to the second face, because we claim it was all within the one quarry, and if we admit that these sums were greater that would be also an admission, it [18] seems to me, that it was a justified move from one quarry to another quarry.

The Court: Well, I assume that we had better try this in two phases, then: First, the question of whether there was a breach of the contract; second, if the Court determines that the Government broke the contract, why, then—

Mr. Lichty: (Interrupting) Because much the longest phase of the case would be the second phase of the case.

Mr. Langley: Yes, I think that is a proper suggestion, your Honor, and we agree to that.

The Court: All right, you can frame your pre-trial order around that.

Mr. Lichty: On the first point, and then, if the Court holds with that, then we will go to the second one.

The Court: Yes. Now, as to exhibits, have you exhibits that you wish to introduce?

Mr. Langley: Yes, your Honor, we have several exhibits. There is one thing that I might bring to your Honor's attention that might be settled at this time. Of course, we are at a disadvantage in the absence of this man that was a resident engineer. We have his diary. Now, of course, we haven't any way of proving it; he isn't here, we can't prove the diary, but we are wondering if we could have a stipulation to have his diary admitted in evidence. That seems to be the only fair way of solving the problem of his absence. [19]

Mr. Lighty: Well, of course, we are not going to be bound by his ex parte statements in that diary, your Honor. If we did we would be walking right out of court.

Mr. Langley: Well, of course, then, that brings up the question again of whether or not we can proceed to trial. As I understand,—and I think it is the proper attitude of your Honor,—you felt we could go to trial, and if you felt there was any injustice it could be considered at that time, but the question on the date of the beginning of operations, which is an important matter in the case, the only evidence we have on that is this resident engineer, his testimony or his diary. You see, these gentlemen are his superiors, but all they have is his narrative report; their testimony would be hearsay. We can do this, your Honor: The legal question involved is the matter of whether or not there was a warranty, it seems to me, in this contract as to the quality and quantity of the material at the source. It

would be a piecemeal proposition. We can proceed on that point. We don't need his testimony for that.

The Court: You don't know where this man is?

Mr. Langley: Well, we think he is in New Guinea, but we can't determine from the Army. I had a telegram last Friday from the Attorney General asking that the case be postponed six months on recommendation of the Bureau of Roads, in the hope that they could make arrangements with the Army to have him return, but I did not suggest that to your Honor because I know that we have [20] got to expedite these cases as much as possible. Now, so far as his deposition is concerned, we might be able to take his deposition, but it would be based on this diary; we would have to send him a copy of the diary and prepare questions based on the diary, and Mr. Lichty would likewise have the advantage of the diary. That would be all we have.

The Court: Well, I would suggest that you have to get to some sort of agreement about this, either have to use the diary or allow the Government to take his deposition. I am not so sure that the diary is inadmissible, the circumstances accounting for your inability being called to my attention. I am not ruling on it. If the diary is kept in the course of official business and the inability of the writer of the matter being accounted for, it is possible,—I don't know; I am just speculating on that.

Mr. Langley: Yes. There was a new statute passed, I think, in '41, by the Oregon Legislature on that.

The Court: In any event, you would have more—I may say this, that this being the only witness for the Government, apparently, if it is not admissible—

Mr. Lichty: (Interrupting) May I suggest, your Honor, that after the pre-trial order is made I would have no objection to having deposition prepared and prepare cross-interrogatories and try to get the matter to his commanding officer.

The Court: When was this case brought? [21]

Mr. Lichty: December 7th. There is no need, as I understand it, to introduce any exhibits at this time except on the first phase as to whether or not there was a breach of contract.

The Court: Yes. The Court will allow you to go ahead with the introduction of the documents in my absence.

Mr. Lichty: Yes.

The Court: Court is now in recess.

(A recess was thereupon declared, the Court left the bench, and in the absence of the Court proceedings herein were continued as follows:)

Mr. Lichty: I want to introduce four photographs for the plaintiff as being photographs of the original quarry in question.

(The four photographs referred to were thereupon marked as Plaintiff's Pre-trial Exhibits 1, 2, 3 and 4.)

Mr. Lichty: Go ahead, Mr. Langley and put your exhibits in.

(Mr. Lichty then departed.)

Mr. Langley: As Government's Exhibit 5, photostatic copy of Bid, Contract, and Bond for Forest Road Construction, this photostatic copy being under the seal of Philip B. Fleming, Federal Works Administrator.

(Said certified photostatic copy of Bid, Contract, and Bond for Forest Road Construction, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 5.)

Mr. Langley: 5-A is General Specifications FR50-1935 for Forest and Park Road Construction.

[22]

(Said General Specifications FR50-1935 for Forest and Park Road Construction, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 5-A.)

Mr. Langley: As Government's 6, photostatic copy of letter dated June 7th, 1937, addressed to Homer G. Johnson, signed by M. L. Wilson, Acting Secretary, Department of Agriculture, notification of acceptance of proposal.

(Said certified photostatic copy of letter, M. L. Wilson, Acting Secretary of Agriculture, to Homer G. Johnson, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 6.)

Mr. Langley: As Government's Exhibit 7, telegram dated June 7, 1937, addressed to Homer G. Johnson, notice to start operations within ten days.

(Certified photostatic copy of telegram, bearing date June 7, 1937, Bureau of Public Roads

to Homer G. Johnson, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 7.)

(Thereupon, at 12:30 o'clock P. M., June 1, 1943, pre-trial conference herein was suspended.) [23]

Monday, June 7, 1943, at 10:30 o'clock A. M., the production and marking of pre-trial exhibits herein was resumed, as follows:

(In the absence of the Court)

Appearances:

Mr. William Langley, Assistant United States Attorney, appearing for defendant.

(The absence of Mr. Lichty was noted.)

Cloyd D. Rauch, Court Reporter.

Mr. Langley: Letter dated June 30th, 1937, signed by Homer G. Johnson, acknowledging receipt of instructions to proceed with this project.

(Certified photostatic copy of letter bearing date June 30th, 1937, Homer G. Johnson to Bureau of Public Roads, San Francisco, California, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 8.)

Mr. Langley: Letter dated July 14, 1938, addressed to Homer G. Johnson, signed by C. H. Sweetser, being Change Order No. 1.

(Certified photostatic copy of letter bearing date July 14th, 1938, C. H. Sweetser, District Engineer, to Homer G. Johnson, Change Order

No. 1, so produced, was thereupon marked as [24] Defendant's Pre-trial Exhibit 9.)

Mr. Langley: Letter dated October 1, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, temporary suspension of construction.

(Certified photostatic copy of letter bearing date of October 1, 1937, Joseph E. Wood, Junior Highway Engineer, to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 10.)

Mr. Langley: Letter dated October 4, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction.

(Certified photostatic copy of letter bearing date of October 4, 1937, Joseph E. Wood, Junior Highway Engineer, to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 11.)

Mr. Langley: Letter dated October 15, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to temporarily suspend construction.

(Certified photostatic copy of letter bearing date October 15, 1937, Joseph E. Wood to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 12.)

Mr. Langley: Letter dated October 16, 1937, addressed to [25] Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction.

(Certified photostatic copy of letter bearing date October 16, 1937, Joseph E. Wood, Junior Highway Engineer, to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 13.)

Mr. Langley: Letter dated November 5, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to temporarily suspend all construction.

(Certified photostatic copy of letter bearing date November 5, 1937, Joseph E. Wood to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 14.)

Mr. Langley: Letter dated June 13, 1938, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction operation.

(Certified photostatic copy of letter bearing date June 13, 1938, Joseph E. Wood, Assistant Highway Engineer, to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 15.)

Mr. Langley: Letter dated June 20th, 1941, addressed to Homer G. Johnson, signed by C. D. Curtice, Acting Commissioner of Public Roads, refusing consideration of Johnson's claim. [26]

(Certified photostatic copy of letter bearing date June 20, 1941, consisting of two pages of typewritten matter, C. D. Curtis, Acting Commissioner of Public Roads, to Homer G.

Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 16.)

Mr. Langley: Letter dated May 13, 1941, addressed to Public Roads Administration, signed by Homer G. Johnson, asking consideration of his claim previously presented to District Engineer's Office, San Francisco, California.

(Certified photostatic copy of letter bearing date May 13, 1941, Homer G. Johnson to Public Roads Administration, Washington, D. C., consisting of two pages of typewritten matter, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 17.)

Mr. Langley: Letter dated June 15, 1939, addressed to Homer G. Johnson, signed by C. H. Sweetser, District Engineer, denying claim submitted by Johnson, consisting of six pages.

(Certified photostatic copy of letter bearing date June 15, 1939, C. H. Sweetser, District Engineer, to Homer G. Johnson, consisting of six pages of typewritten matter, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 18.) [27]

Mr. Langley: Letter dated January 18, 1939, addressed to C. H. Sweetser, District Engineer, signed by Homer G. Johnson, presenting claim of Johnson, consisting of twenty-four pages.

(Certified photostatic copy of letter bearing date January 18, 1939, Homer G. Johnson to

C. H. Sweetser, District Engineer, and enclosed tabulations, consisting of twenty-four pages of typewritten matter, so produced, were thereupon marked and identified as Defendant's Pre-trial Exhibit 19.)

Mr. Langley: The original diary kept by Joseph E. Wood of daily events concerning the involved project.

(Said original diary, bearing number 10, J. E. Wood, 1937, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 20.)

Mr. Langley: Original Daily Report for Crushed Rock Surfacing, kept by Joseph E. Wood, of the involved project.

(Said daily report for crushed rock surfacing, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 21.)

Mr. Langley: Plan and Equipment Questionnaire, executed by Homer G. Johnson, concerning the involved project.

(Said plan and equipment questionnaire for engineering construction, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 22.)

(Whereupon pre-trial conference herein was concluded.) [28]

[Title of District Court and Cause.]

CERTIFICATE

I, Cloyd D. Rauch, hereby certify that on June 1st and 7th, 1943, I reported pre-trial conference proceedings had in the above entitled court and cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 28, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said dates as aforesaid, and of the whole thereof.

Dated this 14th day of June, 1943.

CLOYD D. RAUCH

Reporter.

[Endorsed]: Filed June 16, 1943.

In the District Court of the United States for the
District of Oregon

Civil No. 1693

HOMER G. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Portland, Oregon, Tuesday, April 18, 1944.

10:05 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. John Lichty,

Attorney for Plaintiff.

Mr. William Langley,

Assistant United States Attorney, appearing
for United States of America, Defendant.

PROCEEDINGS

The Court: All right, Mr. Lichty and Mr. Langley.

Mr. Langley: Your Honor, I would like to ask permission for Mr. Brown and Mr. Steele—they are from the Bureau of Roads, of San Francisco—to sit at the counsel table with me.

Your Honor, concerning the pre-trial order, these gentlemen asked me if I would insert something in

the pre-trial order that has not been in it previously, and I have talked to Mr. Lichty about it. I understand he has no objection. Instead of retyping the complete pre-trial order I have just got a page to substitute here, if there is no objection.

Mr. Lichty: Your Honor, I don't think that it adds anything material to it. It is merely one of their contentions that they will make. I think it is broad enough, but if they deem it necessary I have no objection.

The Court: It may be done.

(Opening statements were here made to the Court.)

The Court: Call your witness.

PLAINTIFF'S EVIDENCE

HOMER G. JOHNSON,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. Will you state your name, please.

A. Homer G. Johnson.

Q. Mr. Johnson, you are the plaintiff in this action?

A. Yes, sir.

Q. I hand you Defendant's Pre-Trial Exhibit 5A, ask you if those were the specifications that were provided to you, or a copy of the same. [2*]

A. Yes. This is a general specification.

(Testimony of Homer G. Johnson.)

Q. A copy of the general specification. Did you examine those specifications and make a bid on the project covered by them? A. Yes, sir.

Q. Did you examine the site of the job prior to making your bid? A. Yes, sir.

Q. What did you find there at approximately the location three-tenths of a mile right of Station 1239?

A. A rock quarry.

Q. Keep your head up and your hands down. I can't hear you.

A. I say the rock quarry that had been selected for the job.

Q. Did the quarry have the appearance of being a good quarry for this job?

A. Yes. It looked like it had every indication that the rock would be all right and it would be a practical quarry to operate in.

Q. Did you also examine the area about five-tenths of a mile right of Station 870?

A. Yes. I went in and looked over the gravel pit.

Q. Had that been opened?

A. Yes, that had been opened up, and there was a creek running through it. It was a little hard to get around in there on account of water was flowing all over the place, and I walked around it. There seemed to be lots of gravel there.

Q. Now did you, at the request of the Government and prior to entering on the job, submit to them a plan and equipment question- [3] naire?

A. Yes, there was a plan.

(Testimony of Homer G. Johnson.)

Mr. Lichty: I will ask to have the Pre-Trial Exhibit previously handed to the plaintiff marked in evidence.

The Court: It is admitted.

(The General Specifications FR50-1935 for Forest and Park Road Construction, so offered and received, having been previously marked "Defendant's Pre-Trial Exhibit 5A", was marked Plaintiff's Exhibit 5-A.)

Q. Handing you Defendant's Pre-Trial Exhibit 22, is this the plan you submitted to the Government for operating that job?

A. Yes, this seems to be.

Q. Will you examine the equipment schedule that you have listed in there. A. Yes.

Q. Was that equipment furnished on that job?

A. Yes. That is practically identical with the equipment that was used down there.

Q. Did the Government at any time question the adequacy of your plan and the equipment you proposed to put in there?

A. No, I don't think so.

Q. Not previous to doing the work, at any rate?

A. No.

Mr. Lichty: I ask to have that marked in evidence and admitted.

The Court: It is admitted. [4]

(The Plan and Equipment Questionnaire for Engineering Construction, executed by Homer G. Johnson, so offered and received, having been

(Testimony of Homer G. Johnson.)

previously marked "Defendant's Pre-Tritl Exhibit 22," was further marked Plaintiff's Exhibit 22.)

Q. Mr. Johnson, in making your bid and proposal, did you rely on the adequacy of the quarry approximately three-tenths of a mile right of Station 1239?

A. Yes, I relied upon those two sources.

Q. What plan did you propose for the production of the cover material or oil rock when you made your bid?

A. Well, there was a very strict specification on that oil rock as far as the texture was concerned and we planned on getting the oil rock mostly out of the quarry on account of the fact that the gravel pit would be very difficult to crush the oil rock out of on account of the gravel was quite fine and it required I think material up around an inch and a quarter or an inch and a half as the minimum before you could start making the oil rock out of it and there wasn't a great lot of that material in the gravel pit.

Q. What is the relative economy in the production of your oil rock as the base course is being produced and having to produce it subsequently?

A. Well, there was two very important factors there which would require the oil rock to be produced from the quarry. One was it would be much cheaper to do it and another one would be that we [5] would need the oil rock before we ever got to the gravel bar, because we were planning to start at the east end of the project, which was the end where the

(Testimony of Homer G. Johnson.)

rock pit was, and if we didn't get out oil rock where the rock pit was as we finished surfacing on the road and put the prime coat on we wouldn't have any chance to put the oil coat on and if we didn't get the rock out of that setup we would have to complete the road clear over to the gravel pit before we would be able to get out any oil rock to do heavy oiling with on the east end of the project. Then another thing was that when you could take that oil rock out of the crushed stuff there wasn't any specification for material, coarse material of maximum size, which was three-quarter minus, and there was grading on the stuff from one-quarter down but there was no grading between a quarter and three-quarters and you could rob a little of that oil rock out of there on that upper size and that would help bring up the fine on account of there was a heavy fine requirement and the surfacing material required around 50% passing the quarter, where the ordinary crushing machines don't produce quite that high a content without re-crushing the material after it was ground down; in other words, without extensive recrushing; and, as I say, by robbing a little of that stuff above a quarter, between a quarter and three quarters, which is what the oil rock consisted of—the size of the oil rock was from one-quarter to one-half—and robbing a little of that material out of there along as we were crushing the surface course, that would give us a chance to gain that material [6] and then reduce the large content in the surface material, and consequently at the same time bring up the fine content which would help

(Testimony of Homer G. Johnson.)

in the crushing. At the same time we would be getting our oil rock out along so as to have it on hand when we were going to need it. When we would get, say, five miles of surfacing done we would probably need our oil rock.

Q. Now your bid was accepted and the contract was entered into? A. Yes.

The Court: His bid was quite low, as I remember it. Am I right in my recollection?

Mr. Lichty: Q. Were the bids of much variation?

A. Yes. My bid was considerably lower than the others were.

Q. Now on about June 7th, I believe, you received a telegram from the Bureau of Public Roads to proceed?

A. I think it was dated June 7th but I actually got it on the 9th. It came to my office. At that time I had my office in the Imperial Hotel. It came there on the 8th but I didn't receive it until the 9th.

Q. Now about June 16th or 17th you went down to the job, got on the job on June 18th, I believe, did you not?

A. I am not sure exactly when we did go down. I didn't make a memorandum of that. Anyhow, I got Mr. Hildeburn, who was figuring on being superintendent, and Mr. Thomas, who was going to do the trucking, and we got in my car and drove down to the project and spent a day there I think on the project, as I remember [7] it, and we met Mr. Woods, the resident engineer, who had already arrived there a few days before that, and I told him that Mr. Hilde-

(Testimony of Homer G. Johnson.)

burn was going to be in charge of the job and he would be down in a few days and get going to work as quick as possible.

Q. Did you go with Mr. Wood to that quarry site at that time?

A. No, we didn't go there at that time.

Q. You didn't go there at that time. You went over the job with Mr. Hildeburn and Mr. Thomas?

A. Yes. We drove over the job rather quickly and then scouted around.

Q. You made your plans with them for the method of proceeding to do the job?

A. Well, with Mr. Hildeburn, yes. In other words, we talked it over in general and decided on some of the things that would have to be looked after right away about getting lumber ordered and various things, and equipment that would come in first, and so forth.

Q. Now you and Mr. Hildeburn and Mr. Thomas then returned to Portland?

A. Yes, we returned to Portland.

Q. And about how long after that did you send Mr. Hildeburn back with men and the compressors to start drilling?

A. Well, Mr. Hildeburn got ready as quick as he could. Of course they moved down. He had a family to take along. [8]

Q. About how long was it? That is all I want to know.

A. Oh, about a week or so, maybe. Somewheres around a week, I would say.

(Testimony of Homer G. Johnson.)

Q. Now what is the first intimation that you had that the quarry which was being drilled by Mr. Hildeburn would contain soft material?

A. Well, it was somewhere along a few days after the 4th of July they started in drilling, I think. I know I talked to him every night or two on the phone, and I remember talking to him in regard to working over the 4th of July, if possible, in order to hurry the job along. Sometimes the crew was hard to keep on the job during the 4th of July and we wanted to hurry the job along so I talked to him in regard to that, and then in a few days afterwards he called me—I think it was the next time he called me, which was three or four days afterwards, if I remember right, and he mentioned I had better kind of softpedal the thing, because he was inclined to think the quarry was going to be a failure, and find what they had found in this coyote hole.

Q. Did you go down and talk to Mr. Wood about the soft material shortly after that?

A. Well, I think he called me again, as I remember, and——

Q. Who called you? A. What is that?

Q. Who called you?

A. Mr. Hildeburn, and he stated that Mr. Wood had sent for the [9] material engineer in San Francisco to come up—and the headquarters were at the District Offices in San Francisco—to come up and take a look at this quarry and decide what they were going to do about it, and about what they had

(Testimony of Homer G. Johnson.)

found in this coyote hole, and he said Mr. Steele, I think, was the material engineer in——

Mr. Langley: Let's not have all this hearsay. If Mr. Hildeburn knows about this let him testify about it, not Mr. Johnson.

Mr. Lichty: Q. Did you talk to Mr. Wood, or Mr. Steele, or any of the engineers of the Government, about this material being soft before the quarry was shot; and, if so, when?

A. Well, when Hildeburn told me to come down, why, Mr. Steele was there. We all met out there at the quarry that morning; as I remember it, it was in the morning; and we discussed the quarry situation then.

Q. What, if anything, did Mr. Steele, Mr. Wood, or any of the Government engineers, tell you about the material that had been discovered to be soft in the quarry?

A. Well, we had quite a little conversation about it and they said, "Well, the material is not going to be what we thought it was, or what we expected, or what we would like, but we will have to try to make the best of it, as we have searched the country all over for rock quarries and there wasn't nothing else available," and discussed the various methods to operate and I thought if we could mix this soft rock it was a much greater portion of good [10] rock than there was bad rock, and I thought if we could mix this bad rock in with the good rock we would probably get by with the stuff and make a good road out of it.

(Testimony of Homer G. Johnson.)

Q. You did proceed after that to shoot the quarry? A. Yes.

Q. Now will you explain to the Court the equipment that you put in after the quarry was shot, and how that quarry was operated?

A. Well, we took down a jaw crusher for a primary breaker and in order for the rock to go in first. When the rock would come out of the quarry it of course would take quite a large size rock. Then we used a three foot cone crusher; then we used to set a roll for finishing a quarter or even to make the real fines with; then we had a belt conveyor and screens separating the material, or scalping it and separating it and grading it, and so forth, and we had a set of scales for weighing, and we had the equipment, the engines and power plant, and our compressor and pipes for drilling the quarry; and we had road graders and rollers for placing the stuff on the road with, and water tanks, and of course trucks.

Q. Now what was your method that you used in moving the rock from the base of the quarry into the crusher?

A. Well, we set up what we ordinarily call an ordinary dragline system and have a bucket that will drag back and forth through the quarry and pick up this rock and drag it to the crusher. It has an endless line on it that works with one line attached to [11] one drum to drop the bucket and another line fastened to the other drum to the other end of the bucket, and in that way it pulls

(Testimony of Homer G. Johnson.)

it back and forth, whichever way you turn with the hoist.

Mr. Lichty: I might ask the Court one question, if the Court will permit it. Just how familiar is the Court with the production of material like this? Is the Court familiar with the draglines and power shovels, and different equipment, and how they are operated or not? I don't want to waste a lot of time trying to educate your Honor on something you already know.

The Court: Well, I pretty near missed my Christmas dinner by listening to a rock crushing and pavement case here the last week of the year that Patterson had out at Hillsboro, and Bullivant suing for a contractor and a subcontractor, and I should have.

Mr. Lichty: That will simplify the making of the record.

The Court: I thought they should have gotten through in two days and they took seven.

Mr. Lichty: That will simplify making the record, your Honor.

The Court: They didn't get through until four o'clock the day before Christmas. If we ever saw a man throw away a good case by using up too much time and making the jury wonder whether they were going to get home by Christmas or not, that was it.

Mr. Lichty: Q. Mr. Johnson, were you present on the job—relatively how much time did you spend

(Testimony of Homer G. Johnson.)

on this job from the time it started until they finished? How often were you there approximately?

[12]

A. Well, I was there pretty much all the time after, say, around the first or the middle of July, the 20th of July. I was there a great deal of the time. That is, I would be away maybe for a day or two and come back and stay two or three days and maybe go again.

Q. Did you build a camp for the project to house the men that were working on it?

A. Yes. We had to build camp for about fifty men. We had to take care of our own men and get a place for the Government inspectors.

Q. Did you see the operation of this quarry No. 1, as we have designated it, almost weekly after the middle of July?

A. Yes. I was there fully every week.

Q. Just explain to the Court what developed in the quarry as you were producing the material.

A. Well, as we started in to produce the material we had merely shot, oh, I would say a little deeper than this room, perhaps, and about half again as wide, and about half again as long, and that was in this ridge that run through the country there practically vertical to where the ridge run, and we started in, say, on the right hand side, and we put our block back behind and put out our lines and started with a Bagley scraper, bringing in the stuff, you know. Say, assume that door back there was the center of the quarry and we started in just

(Testimony of Homer G. Johnson.)

slightly to the right of that and we worked to the right a little ways on the rock and found it was pretty soft over there on the back end and so we had to switch the line to the left, to go around to the left, and we [13] kept on operating that way.

Q. About how far would you get down from the top before you would hit this soft rock?

A. Well, I would say it was around—oh, to start with it was probably around twenty or twenty-five feet.

Q. Then you would swing——

A. However, as we went to the right it was soft right to the top of the quarry. In the quarry it was soft right to the top. We had to abandon the right hand side. At least probably ten or fifteen feet of the material that was shot out, we had to abandon that.

Q. Now what would the excess of this soft material do to your crushing equipment?

A. Well, on the recrushing end of it was where it would work the worst. It would go through the jaw crusher and go through the cone crusher pretty good, but when they got to running it through the rolls to break up those fines, which was required in the material that stuff was slightly damp and that rock which would not break would drop away like from your hard rock. You see, it was just sort of mashed as it went through the rolls and the moisture would sort of solidify it to the rolls and the rolls would build up. And we worked out methods to try to scrape it off from time to time but they

(Testimony of Homer G. Johnson.)

were more or less impractical; at least they didn't work very good and it would be hard to keep it from build- [14] ing up on the rolls and as it built up the rolls and enlarged the rolls that would throw the shafts out of line and they would work that way so long and then break right in two.

Q. How many shaft breakdowns occurred, as you recall, on that job?

A. We had three or four.

Q. How long would you have to shut down when a breakdown like that occurred?

A. Well, the best we done was about two days and two nights. We had three shifts of men and we worked day and night on it and fixed it up.

Q. Where would you have to get your replacement shafts?

A. Well, either Portland or San Francisco. I think one came from Spokane. It was expressed all the way from Spokane. That was the nearest we could get it.

Q. Had you used the same rolls on the crusher in another job?

A. Yes. I had used it two years before that. I had rented it out on one job.

Q. Had you ever had shafts break before?

A. No, there had never been any shafts broken yet before.

Q. Have you used the same equipment since?

A. Yes. It was used up until along about last Christmas and I sold it a short time ago.

(Testimony of Homer G. Johnson.)

Q. Did you have any other break on any quarry work after this job?

A. No, it has never broke a shaft since.

Q. Describe to the Court when you would get down to this soft [15] material the delays that would be occasioned in inspection and rejection of your material.

A. Well, we would get in to the different areas in the quarry where this stuff would be more predominant than in other areas, and then when we got into those areas, why, the material wouldn't weigh as much as the heavier, the better material, and of course the inspectors soon learned that was the way to check it, and of course a lot of times the load would be loaded up and they would get on the scales and they would see it was light, even if we have loaded it about the same. Well then, they would hold up the trucks and it would take a lot of investigation of the material in the truck and then sometimes go back in the quarry and look around. But sometimes they would hold the truck, or dump the material in the truck, or hold it there or something, until they got hold of the Resident Engineer, and there was a lot of delay holding the trucks that way.

Q. Were there many days when the breaking of the shaft would shut you down because the material was not satisfactory?

A. Yes, there was quite a lot of days we had to shut down and change or do something to improve the condition.

(Testimony of Homer G. Johnson.)

The Court: You had better put in something about his experience in this line of work.

Mr. Lichty: Q. Mr. Johnson, how long have you been a contractor engaged in dirt, rock moving, graveling, paving?

A. Well, about twenty-three years.

Q. Where have you lived during this time? [16]

A. Well, I used to live down at Roseburg and I have been living in Portland for a good many years.

Q. How many years in Portland?

A. Well, I have lived eleven years at the Imperial Hotel without checking out, and I have forgotten how many more years since I came here.

Q. Have you performed other jobs for governmental agencies, state, United States, counties, on road work where the conditions were similar to those that you saw when you first bid on this job?

A. Oh, yes, lots of them, for everybody around. I worked for the State of Washington, the Highway Department, the State of Oregon, and the Bureau of Public Roads at Ogden, and the Bureau of Public Roads here at Portland, and—oh, some of the other counties.

Q. What was the contract price for this work?

A. I have forgotten now.

Q. What was your original contract price, do you recall?

A. Well, I think the total bid was to be eighty-six thousand, something that way, eighty-four thousand, something that way. I have forgotten now.

(Testimony of Homer G. Johnson.)

Q. You have operated many contracts for dirt moving, graveling, grading, of this same size?

A. Oh, yes, lots of them.

Q. You have had contracts running how high?

A. Oh, two hundred fifty thousand, three hundred thousand dollars. [17]

The Court: Did you know that Shasta country?

Mr. Lichty: Q. Had you worked in the Shasta country before?

A. Well, no, I hadn't never worked down around in that area before.

The Court: Ordinarily wouldn't a contractor make more of an investigation of rock than was made here? You ask him that.

Mr. Lichty: That is something that we are contending that he had the right to rely on, and that the Government would not have provided that he would have to use this rock if they hadn't satisfied themselves thoroughly it was satisfactory.

The Court: Just the same, I would like to get a statement from him as to how things are done usually in railroad construction and highway construction where rock is involved.

Mr. Lichty: You may ask him the question direct, if you care to.

The Court: No. You do it. You know what I want. This seems like a blind pig in a poke to me.

Mr. Lichty: Well, of course, you are just meeting our contention on it. That is, if they had not put that in—you might say to produce our own experience if they hadn't done that, but this lowered

(Testimony of Homer G. Johnson.)

our guard and we were entitled to rely on it, and I will be able to submit to your Honor a number of cases where the same contention was made by the Government and——

The Court: Let's have his view on it anyhow. A lawsuit is always a poor substitute, as every contractor knows.

Mr. Lichty: Q. Why did you not make a more extensive investi- [18] gation of this rock that was used in that quarry?

A. Well, I will say contractors use certain prices and those prices are developed by the various engineers of the various road building bodies and the contractors themselves, and some places, why, they advertise a job and they say they want certain materials and they let it go at that, and then other places they say, "Well, there is a quarry site here, or a gravel pit here," and so forth, and when they do, why, generally those are picked out to be the best and more suitable material generally on the job that is available for the job, so the contractors have got to where they rely upon those things, and when they get specifications for a job they immediately look up the sources of the material and if the sources are stated then they go right to those sources and if they look all right, in other words, if they look as though the material is there, there is nobody can see in the ground, one man can't see in the ground any more than another can, and so we look the situation over and if every indication looks

(Testimony of Homer G. Johnson.)

favorable that the material is there, or all right and everything, why, we know they have specified it and we assume they stand back of it, which has been practically the custom, I take it. Up here I don't know of any case where they have refused to stand back of the material where they have specified it. Especially *there* the specification in regard to the sources of the material was just a little different than it is generally in these plans and specifications. There they said that you could not take the material from any other sources, only these sources that they would specify. Why, the general provision—I mean, the general usage of that sort of a term in most of these contracts, like Oregon and Washington, and the Bureau of Roads here uses, say, that certain materials are available in certain places the state has picked out or the Government, and that other materials can be used if they meet the requirements, and it is up to the contractor to assume the responsibility of getting this and providing the material in the specifications.

Mr. Lichty: Is that enough, your Honor?

The Court: It gives his view.

Mr. Lichty: Yes.

Q. Now as the job progressed here—first, at the start of the job did you take a picture of the face of this quarry before you had shot it?

A. Yes, I took it.

Q. I hand you Plaintiff's Pre-Trial Exhibit No. 26 and ask you if that is the picture you took of the quarry before it was shot?

(Testimony of Homer G. Johnson.)

The Court: Do you want to break the morning?

Mr. Lichty: I would like to have about five minutes, if I might.

The Court: All right. Take your time.

The Witness: Yes, I think that——

Mr. Lichty: Just hold it until afterwards. [20]

(Short recess.)

Mr. Lichty: Q. Mr. Johnson, is that photograph, Plaintiff's Pre-Trial Exhibit No. 26, an accurate representation of the face of that quarry before you started your operation?

A. Yes. That looks like it was the original, or a picture of the original hillside there.

Q. You took the picture?

A. No, I didn't take that picture.

Q. Who did, do you know?

A. I don't know.

Mr. Lichty: Has it been marked in evidence yet? If not, I will offer it in evidence.

The Court: It is admitted.

(The photograph so offered and received, bearing the legend on the back, "Taken 1937. View of face No. 1 of Johnson quarry before shooting by Johnson", having been previously marked Plaintiff's Pre-trial Exhibit 26, was further marked "and trial".)

The Court: Just put all the pictures in. Whatever they show I am sure counsel will agree. Mr. Langley, all these pictures may go in, I am sure?

Mr. Langley: Yes, your Honor.

(Testimony of Homer G. Johnson.)

The Court: They are all admitted as being photographs of what they purport to be on the job.

Mr. Lichty: Well, just admit the whole bunch.

The Court: You can mark them later, Mr. Person. Give them the [21] same numbers as the pre-trial exhibits.

(Pursuant to the foregoing the photographs previously offered upon pre-trial as Plaintiff's Pre-trial Exhibits 1, 2, 3 and 4, were further marked "and trial"; and the photographs marked Plaintiff's Pre-trial Exhibits 24, 25, 27 and 28, were further marked "and trial".)

Mr. Lichty: Q. Handing you, Mr. Johnson, photograph marked Pre-Trial Exhibit No. 4, I will ask if you will explain what that represents.

A. This represents the quarry on the right hand side, which shows a great deal of the rock that was shot up but never used due to the fact that it was soft. This was apparently taken after the abandonment of the quarry.

Q. Handing you Plaintiff's Pre-Trial Exhibit No. 2, what does that photograph disclose?

A. Well, that shows the position just about the center of the original quarry and it shows the same as it was abandoned.

Q. With the material left in the quarry that was too soft to use?

A. Yes. It shows it just about as it was abandoned, as I remember it.

Q. Handing you Plaintiff's Pre-Trial Exhibit No. 1, I will ask you what that represents.

(Testimony of Homer G. Johnson.)

A. Well, this is a very good photograph of the natural face of the quarry as it was abandoned. This photograph was taken on the left [22] hand side of the quarry.

The Court: If he is an experienced man—I have no doubt he is—you had better have him in a few words tell just how bad he thinks this material was, from his experience.

Mr. Lichty: Q. Answer the Judge just as he has asked it. In your opinion and from your handling of this material, how bad was it compared to a good commercial quarry?

A. Well, the material was very much softer. In other words, I could take a piece of rock similar to a stick of stove wood and you could take your jack knife and practically whittle it just like you would a stick of stove wood.

The Court: Well, did he ever get into bad rock before?

Mr. Lichty: Q. Have you ever attempted to use rock of this quality for road building material before?

A. I never got into a rock like that before. In other words, that soft rock looked like good rock. It seemed to be the same material, and all. But to describe it, I would say it would be like going out to a brick plant and seeing clay that had been baked hard into salable brick and another brick that was just almost in a dough state yet. That is very similar to this rock. In other words, the outer exposure of the rock was hard but as you

(Testimony of Homer G. Johnson.)

got back into it the same class of rock practically was found to be material that was soft.

The Court: What made it soft? Did it have moisture in it?

A. It apparently had never hardened when the original formation [23] was created.

The Court: It didn't have moisture in it?

A. No, it wasn't damp. It was just material that didn't harden. It was the same class of material, and while it was hard on the outer exposure it was soft inside. After you got in it was soft. You could take your knife and stick it down in it.

The Court: How would you classify it by common description or any other way?

A. I am not enough of a geologist to tell you what happened there or what kind of rock it is exactly, or what happened, why the outside was hard and the inside was soft.

The Court: Well, is it your idea that the Government's test pits, or whatever they had done, had gone deep enough?

A. Well, the Government didn't test it out. There was quite a hole in the front of the quarry that was made there by some county forces, I presume, or I understood a WPA crowd had been working in there getting some rock for some work and they had made a gash in there probably eight or ten feet deep and maybe thirty feet long.

The Court: Did that run into the soft material?

A. No, that didn't open the soft material.

(Testimony of Homer G. Johnson.)

The Court: And so your idea is that the Government had just figured, "This is all right from the past use of it and from surface appearance"?

A. Yes. There wasn't any indication that it would ever lead into [24] soft rock. The material looked like it would hold its consistency and looked like there was worlds of it there.

The Court: Was there any other work going on in that neighborhood on that same highway at the time? You had five miles of it?

A. No; we had sixteen miles.

The Court: Sixteen. Was there any other work going on?

A. Well, there was no work in that neighborhood. Farther east there was a project being built further east.

The Court: What highway?

A. What they call Mr. Shasta-Mt. Lassen highway; from Mt. Shasta City and goes out through McCloud and comes out into the Alturas Highway.

The Court: Oh, yes. I have driven through there. Now where was this quarry?

A. About twenty-three miles from McCloud, I think.

The Court: East?

A. Yes.

Mr. Lichty: Q. Now when the quarry was abandoned, as shown by the last exhibit which I handed you, the picture depicts a rock wall all along the back of that quarry extending clear up to the grass roots, the dirt, a very small portion of overburden.

(Testimony of Homer G. Johnson.)

What was the quality of all of that rock that is exposed in that place there now?

A. It was practically all soft.

Q. All what? A. All soft. [25]

Q. Soft?

A. That is too soft for material surfacing and oil rock.

Q. Now when you abandoned that quarry and located rock some distance away and opened up a second quarry, had the Government engineer, Mr. Wood, refused permission to use more rock from this quarry?

A. Yes. He had practically condemned the whole thing to any farther use.

Q. Now when you attempted to produce rock from this second source, had Mr. Wood located this source for you?

A. No. He hadn't located any other source. He and I had looked around some, with the idea of trying to find another substitute quarry, and when he had practically condemned that, that was along about Thursday or Friday of—well, around Labor Day, as I remember it, or just after Labor Day. I didn't keep a diary so I have to go approximately on these dates. And so Hildeburn, him and I talked it over, and so Hildeburn said, "I think the only thing for Homer to do is to get on a train and go down to San Francisco and have it out with them down there as to what we are going to use for some more rock. There is no use wasting money around here and monkeying with this stuff." So

(Testimony of Homer G. Johnson.)

it was sort of agreed between all three of us that would be the thing for me to do, as the Resident Engineer didnt' have any particular authority in the thing and all he could do was tell them in San Francisco what the troubles were and those were the men down there that had the authority. [26]

Q. Well, what did you do?

A. What is that?

Q. What did you do?

A. Well, I went over to Mt. Shasta that evening and got a ticket and got on the train to go down to San Francisco. I went down to the District Office. I got down to San Francisco in the morning and I went up to the District Office along about—oh, I think the train got in at ten o'clock, I am not sure; anyway, I was up there in the forenoon, before noon, and I went to see Mr. Potter and he wasn't there in their office, and then I went in to see Mr. Brown and I talked to him a little about our difficulties, and so he said, well, I had better take it up with Mr. Potter but he didn't think Mr. Potter was in, thought he would be in Monday, however, and so I think he checked with the girl about what Mr. Potter's schedule was, and he said, "Well, I think Mr. Potter will be in all right Monday morning." So then I proceeded to plan on staying over Sunday in San Francisco, and so Monday morning I went down—I went up to the District Office from the hotel and I went and talked to Mr. Potter and I told him what our difficulty was, that we were just practically sunk as far as

(Testimony of Homer G. Johnson.)

any further operation was concerned, and he says, "Well," he said, "I think the thing for you to do," he says, "is to move on over to the gravel." He says, "You have got to do it anyway, and," he says, "the thing to do is to go now. I think you can operate enough cheaper over there to pay you to move now anyway, regardless of quarry." I said, [27] "Well, there is a lot of difference between cost of the haul." I said, "We are just barely up to the plant there with the material from the east end of the project and," I said, "it will take all that excess haul back towards the rock plant from the gravel plant. It is going to make the hauling cost a lot more." I says, "Who is going to stand that?" He says, "Well, we didn't guarantee how much rock you would get out of that quarry." And I said, "Well, I assumed that under those conditions, or under those specifications, why, the contractor could rely upon them", or something to that effect. Anyway, I said, "Well, we have got to solve this situation some way or another and," I said, "I want to know where I am at." And I said, "When are you coming up to the job?" And he said, well, he would be up in just a few days. And so, as I remember it, why, he arrived—that was Monday morning; I think he arrived about Thursday on the job, or within a few days afterward. I am not sure on the dates exactly on account of I didn't have them down.

Q. As a result of that trip what happened?

(Testimony of Homer G. Johnson.)

A. Well, Mr. Wood told me the day before, he says, "Potter will be along in the morning". I said, "Well, I want to be sure to see him while he is here," so I stayed in McCloud most of the time at night. Sometimes I would wait in the store there to take out things they might need around camp, or something, and I got around there I guess about ten o'clock, and when I got on the job [28] I run across Mr. Wood. He was in close to where the crusher was there in a rig that he drove, and I said, "Did Potter come?" He said, "Yes, he has been here and gone." I said, "By golly, what did he want to leave so quick for? I want to see him. I want to get this thing settled as to who is going to be holding the sack around here and what we are going to do to get this job done." And so—I am a little ahead of my story here now. In the meantime while I was in San Francisco, Mr. Hildeburn had decided to take a shovel and go prospecting for another source of the material, and so he went around to this other source up the creek near where his camp was and he located this source, and then while I was on the deal—when I came back from San Francisco they started up operating in this new source and this stuff turned out to be a little better than what they had condemned before out of the old quarry, and so the stuff looked passable and when Mr. Potter came along they looked along and they thought probably the stuff would be better, at least for a while anyway, and so that was the morning that I mentioned the meet-

(Testimony of Homer G. Johnson.)

ing, going out there and Mr. Potter had left. And so I said when I was talking to Mr. Wood about whether Mr. Potter—about—I was disappointed because Mr. Potter left and I hadn't had a chance to talk to him about who is going to pay some of that extra cost around there, and so Mr. Wood said, well he said Potter told him we had better keep track of what that extra cost was because he said I probably would have a claim and they would want to know [29] what I really had coming on that basis for that extra cost.

Q. Now when you opened up the second rock quarry, that was about how long a haul from that quarry to the crushing plant?

A. Well, I think the trucks had to make a circle and go farther of course than what the nearest—

Q. Airline?

A. —route between the quarries would be, and I think the trucks made around six or seven hundred foot circle there; in other words, from one end, the farthest end of where they went to the farthest end where they would dump.

Q. It would be an eight or nine hundred foot round trip? A. Yes.

Q. You didn't remove your crushing plant up to the second quarry? A. No.

Q. You would load the material in the truck by the shovel, take it to the crushing plant, then load it into the crusher, then load it into trucks and distribute it along the road? A. Yes.

(Testimony of Homer G. Johnson.)

Q. Did that make a more costly operation than the dragline operation into the crusher?

A. Oh, yes. It cost much more to haul it. Then there were about three truck operations to haul it from there. In the quarry we were using a dragline most of the time and towards the last when we had time to look around and see whether there was anything good in the corner of the thing we used a truck in there. But [30] the new quarry used about three trucks all the time on account of the distance away.

Q. Now about when was it that you broke your last shaft in that crusher before you moved down to the gravel plant—gravel pit?

A. Well, it was along about the 17th or 18th of September. It was before the 20th.

Q. At that time had the rock in the second quarry which you had opened also begun to show soft?

A. Yes. We figured it was just about petered out and we didn't think there was very much more there and every time we got into that stuff where it was pretty soft, pretty poor, we would have to—those rolls would go bad. You could tell where the rock wasn't so good. Stuff would begin to build up on the rolls.

Q. Then you moved to the gravel pit and produced the rest of the material for this job?

A. Yes.

Q. How far had you completed the base course

(Testimony of Homer G. Johnson.)

from the east end of the job at the time you moved to the gravel pit?

A. Well, we had about, I think, about seven, six or seven miles, between six and seven miles, as I remember, completed.

Q. You were from a mile to two miles from the—— A. Center.

Q. ——center of the job? A. Uh huh.

Q. And you had produced no oil rock? [31]

A. No. We hadn't blocked out any oil rock, and that was where our greatest difficulty was. You see, we had started oiling, putting the prime coat of oil on the surface from the east end of the project and we had oiled clear up to the plant. That was about three-quarters of a mile, and we had some to oil a prime coat up west of the plant, then fully six or seven miles, six miles to where that was ready, either had the prime coat on or was ready for the prime coat, and of course we had no oil rock out and there was no way to put the seal coat on without—I mean without oil rock or rock to go on top of the seal coat. And we could not put that on and the road stayed there in that condition during the winter with just a prime coat on and all that road went to pieces that winter. The prime coat was all dissolved and the road petered out and had to be worked over again the next summer.

Q. Now did you complete your base course surfacing before the job shut down that fall?

(Testimony of Homer G. Johnson.)

A. Yes, we completed all the crushing, the base course and got out the oil rock, too.

Q. Had you spread your base course over the entire length of the project?

A. Yes, it had been spread over the whole thing.

Q. And had not the bad weather interrupted you you could have finished your oil rock course that fall, too?

A. Yes, we could have finished up. It would not have been so late. [32]

Q. You did crush all of the oil rock from the gravel pit that fall——

A. Yes.

Q. ——before you abandoned the operation?

A. Yes.

Q. Then when weather permitted the next spring about what date did you start in operating to do this work over again?

A. Well, a little before the 4th of July, I think about June 18th or 20th, somewheres along there.

Q. You received notice from the Bureau to proceed?

A. Yes. We put a grader in there maintaining the road some time before that. I think he was in there pretty near a month maintaining that road before we had notice to proceed with the oiling.

Q. Was the road being used by traffic?

A. Yes. The road was used all the time by the traffic. It was the only road through the country.

Q. And what had happened to the gutters and ditches during the winter?

A. Well, we had cleaned them all out the fall

(Testimony of Homer G. Johnson.)

before, and, in fact, I think, they were practically all finished, so the next year, or during the winter there was a lot of stuff sloughed off in the ditches that had to be taken out.

Q. Did the Government pay you extra for doing that the second time? A. No.

Q. You state that it was necessary to refinish the surfacing of [33] the prime cost?

A. What was that?

Q. It was costly to go over the surfacing again and make a prime coat on it before you applied your oil?

A. Yes. In other words, you see, this oil had all broken up and it left the original oiled surface all full of potholes, very rough. The only way to smooth that up and get it in shape for re-oiling was to rip it up with scarifiers from one end to the other even, work it hard and put the prime coat on again and be back where we were when we quit last fall.

Q. Now your pay for this job was by the unit or so much per ton of gravel in place, was it?

A. Yes.

Q. And for that work of reprocessing and refishing you received no extra or additional compensation? A. No.

Q. Did the Government extend the time of the completion of your contract by virtue of the difficulties you encountered in this quarry?

A. No.

(Testimony of Homer G. Johnson.)

Q. Did they penalize you for late completion?

A. Yes. There was quite a lot of penalty—sixteen hundred dollars, as I remember.

Q. Had the quarry approximately three-tenths of a mile right of Station 1239 to the first quarry that you opened and shot been an adequate [34] quarry for the production of the material required by this contract, would you have been able to have completed your contract within the time provided within the contract?

A. Yes, I think we would have got through all right. It would have been a close race to beat the bad weather, but we were able to produce around a thousand tons per day and we started right in on the 8th or 9th of August crushing on the road and we had good weather until the latter few days of September when there came a little rain, then it was nice and warm and hot there for a week or ten days afterwards until about the 10th day of October before it turned cold.

Q. When would your contract time have expired, according to the terms of the contract?

A. I don't remember that exact date.

Q. Well, could you find out during the noon hour and we will put it into the record later.

A. Yes.

Mr. Lichty: You may take the witness.

Cross Examination

By Mr. Langley:

Q. Mr. Johnson, that big book there, do you see a marker in it?

A. This one here?

(Testimony of Homer G. Johnson.)

Q. Yes. You see that marker there. Do you see some words that are underlined there on the other side? A. Uh huh. [35]

Q. Now what is that book?

Mr. Lichty: What is the book? Just answer the question.

A. Oh. This is General Specifications.

Mr. Langley: Q. You read those before you bid on the job, did you?

A. Yes. I am pretty familiar with them.

Q. Now read what it says there underlined.

A. It says, "Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies."

Q. I see. Now that other paper there, I mean the other paper lying there, Government's Exhibit, do you see that other paper that is lying there?

A. This one here?

Q. Yes. That is Government's Exhibit No. 22. Is that your signature at the end of it?

A. Yes.

Q. Yes. Now read the first question on the first page and the answer given to it, please. Better read it out loud.

A. "In what manner have you inspected this proposed work?" You mean you want me to read the question or the answer?

Q. Read the question and the answer. Yes.

(Testimony of Homer G. Johnson.)

A. "In what manner have you inspected this proposed work? [36] Explain in detail." I said I had checked it very carefully.

Q. So you went down there and looked over this site; is that correct? A. Yes.

Q. And it looked good to you, didn't it?

A. Yes, it looked like there was material there, the material would be all right and it looked like there was lots of it, and I couldn't—

Q. You knew just as much about it then as the Government's engineers, didn't you, when you started?

A. Well, in other words, I relied upon the specifications. That had sort of become a custom here for years amongst all the engineers of the country and all the different departments letting public works, that if they were going to furnish the sites, in other words, why, they generally had lots of time to select out these sites, while we never had time to go out there and core drill these quarries, and couldn't neither. Sometimes from the time we would get these plans to bid on these jobs and the day the bid would be opened might not be over one or two days and we would have no chance to make an investigation down inside of the ground. All we could do was to observe the top of the ground for what you could see in a reasonable—in the time available.

Q. You didn't ask the Government engineers whether they had made investigation in back of the rock, did you? [37]

(Testimony of Homer G. Johnson.)

A. No. They said the rock was available there, and of course we relied upon that.

Q. And it just was not humanly possible for anybody to see what was in back of the face of that site there, was it?

A. No, no. It was impossible for anyone to see in the ground there without taking some equipment in there and core drilling it, or something that way.

Q. And there was no evidence that the Government had done that, was there? A. No.

Q. How far did you say this so-called second face or second operation was from the first?

A. Well, we took it the trucks had to go about six hundred, around six or seven hundred feet.

Q. Now did you ever measure that?

A. Well, yes. I stepped it one time. I don't remember now just exactly what it was. The actual airline was a little nearer, but—

Q. Which way did you step it, by the airline or by the road?

A. No. I stepped it by the way the trucks went.

Q. By the road? A. Yes.

Q. How far did you step it off?

A. As I remember now, six or seven hundred feet.

Q. When did you arrive on the job down there to stay more or [38] less permanently? Did you say July 20th? Is that correct?

A. Well, somewheres around there; around July 20th, 25th, or somewheres along there.

(Testimony of Homer G. Johnson.)

Q. Now when did you first begin to produce rock?

A. It was about August 8th; somewhere along there, 8th or 9th. Maybe a little before that, on account of it took a day or two to get the material to the grade.

Q. That was about August 8th. And when did you receive notice to begin operations?

A. About June 8th.

Q. Two months later then you began to produce rock; is that correct?

A. Yes. There was lots of work there to get ready to produce rock.

Q. All right. Now your superintendent bore some coyote holes? That is the way you got into the quarry; isn't that correct? A. Yes.

Q. That is the way you got in there. Now when you got in there you saw some soft rock; is that correct? A. Yes.

Q. And immediately you became apprehensive of the quarry's situation? A. Yes.

Q. And then I understand you took it up with San Francisco at that time; is that correct? [39]

A. No. Hildeburn discovered this soft rock first when I was up here in Portland. Then he called me on it. Then they drilled another day or two, worked in the hole there and they extended it farther back. So then he called me and he said, "Well, Wood,"—he said, "I don't think this is going to be much good, this quarry, and Wood don't think so now either, and he isn't the material engineer."

(Testimony of Homer G. Johnson.)

He said, "I think you had better get on the train tonight and come down."

Q. What I am getting at is, the first conversation you had about this quarry. When was it and who was it with concerning the Government?

A. Well, it was somewheres around July—well, it was a few days after they started in there and I think they were drilling there on the 4th of July. I imagine it was around the 8th or 9th of July, somewheres along there.

Q. Now then, who did you have the conversation with, the Government man?

A. You mean who did I have the conversation with that represented the Government?

Q. Yes.

A. Why, when I went down there Mr. Wood had sent for Mr. Steele and he was there, and they came there that morning—

Q. How do you know Wood sent for Steele?

A. Hildeburn told me.

Q. You don't know though. When you got there Wood was there, and [40] then did Steele come?

A. Yes. I think they were all there together.

Q. That was about July 8th and that—

A. Well, that may have been a little bit—

Q. Well, anyway the date is not important. Before that Wood was saying the quarry was bad and ought to be condemned. Wasn't that right?

A. No. We didn't tell them what to do with the quarry. It was up to them. It was their quarry

(Testimony of Homer G. Johnson.)

and it was up to them to do what they pleased with it.

Q. It was your quarry. You were working in it.

A. Yes. However, if they wanted us to use that rock we would get it for them. If they didn't, we would do something else.

Q. What was your position about the quarry the first time you talked to Mr. Wood, or Mr. Steele? Did you think the quarry was all right or did you think it was bad?

A. Well, we all had considerable discussion about it.

Q. I am asking you what you thought, what you told them.

A. Well, I don't remember now exactly what I said, but I sort of concurred in the idea that we could probably operate in it so as to get the material so it would be apparently uniform and not get a lot of bad material at one time and good material another time, and so forth.

Q. So you didn't complain about it then at all?

A. Well, no, not right from the general operation as far as the [41] contract was concerned.

Q. Now when was the first time that you complained about this quarry?

A. Well, along after we started operating a couple of weeks, then of course we began to have a lot of trouble and delay. It was just a constant delay all the time. The engineers would take a few loads and then—

(Testimony of Homer G. Johnson.)

Q. Just answer my question. Can you tell me when you first complained to the Government engineers that this quarry was not what you expected?

A. Well, I think that, in other words, we were all very much surprised to strike soft rock in this at that time, and I think I told them then, and Mr. Hildeburn had told them.

Q. Now that was July 8th then— A. Yes.

Q. —that you told them that in your estimation the quarry was defective because of the soft rock; is that correct?

A. Well, I can't say that I went out and definitely told them that. In other words, we had more or less a conference amongst us. We had all come to that conclusion, that the rock was not going to be what we had thought it was.

Q. Who came to that conclusion?

A. I think all of us.

Q. Well, who was "all of us"?

A. Mr. Wood, Mr. Steele and Mr. Hildeburn and myself. [42]

Q. You told us on direct examination that Steele wasn't there, that he had left before you got there?

A. No, no. Mr. Steele was there when that—

The Court: Potter.

Mr. Langley: Was that Potter?

Mr. Lichty: Potter is the one he said.

Mr. Langley: Q. Then on July 8th, that was the first time there was any discussion about defective soft rock in the quarry; is that correct?

A. Yes, when I was present.

(Testimony of Homer G. Johnson.)

Q: And the Government engineers told you to go ahead; is that correct? A. Yes.

Q. They told you to go ahead?

A. They decided that.

Q. Yes. That is what I want to get at. In other words, you were apprehensive about it, were not sure whether you should go ahead or not, and they came up there and, according to you, they ordered you to go ahead; is that correct? A. Yes.

Q. That is right; and at that time you had some question in your mind about whether their direction was the proper thing or not, didn't you? I mean, you were not in complete agreement with them that you ought to go ahead, were you?

A. No. We didn't think it would be too difficult from our stand- [43] point and it was a matter for them to decide whether—we were not trying to insist that they take a lot of bum material and make a road out of it. That was really an engineer's problem to settle.

Q. So you were satisfied with their so-called ruling at that time that you go ahead with the quarry; is that correct?

A. Well, yes. There was nothing else that we could do.

Q. Now, Mr. Johnson, did you ever read your contract? Show the witness Article XV of the contract.

Mr. Lichty: If the Court please—do you offer that in evidence?

(Testimony of Homer G. Johnson.)

Mr. Langley: All right. Do you have any objection?

Mr. Lichty: No objection. What pre-trial number is that? Will you hand it to the reporter, please, so he will have in his notes what that is.

The Court: It is admitted. It may be marked. What number is it, Mr. Person?

The Reporter: Defendant's Pre-Trial No. 5.

(The photostatic copy of Bid, Contract and Bond for Forest Road Construction, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 5, was further marked "and trial".)

Mr. Langley: Q. I will ask you to read Article 15 of the contract, Mr. Johnson, please. [44]

A. "Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

Q. So you did have a remedy then, if you wanted to avail yourself of it?

Mr. Lichty: We object to that as argumentative, your Honor. That is a question that belongs to this Court, not for the witness to determine or counsel.

(Testimony of Homer G. Johnson.)

The Court: He may answer that. He asked you why you didn't follow that course.

Mr. Lichty: No, he didn't ask him that. I would like the question read.

Mr. Langley: Q. Well, I will ask you that. Why didn't you follow that provision of the contract?

A. Well, it didn't particularly concern us. In other words, if they wanted that we didn't care so much. If it was mud they wanted, why we would give it to them. See? We were not particularly concerned in whether the rock was hard, soft or intermediate, or how it was, or whether it was clay they wanted. If they wanted that we would give it to them. We didn't think there [45] was any question but what we could probably crush this stuff and put it through the plant. So it was a question for them to decide whether they wanted this material or not. It wasn't our question; it was their question. I mean, it wasn't our problem; it was their problem.

Q. Now when is the first time you went to San Francisco about this quarry?

A. Well, as I remember, it was right around Labor Day; I think a few days after Labor Day.

Q. And who did you talk with there?

A. Well, I went up to see Mr. Potter, because I knew he was handling the job from the District Office, and he wasn't in, and so then I thought I would go in and talk with Mr. Brown a little bit, and I told him the difficulty and he suggested I take it up with Mr. Potter, which, of course, was the proper

(Testimony of Homer G. Johnson.)

place to start with. And so I think he said Mr. Potter wasn't in and wouldn't be in until Monday, but he picked up the telephone and asked the girl if she knew what Mr. Potter's schedule was, and I think he said, "That is right. He won't be in until Monday morning."

Q. This is the Mr. Brown you talked to?

A. Yes.

Q. The gentleman sitting here? A. Yes.

Q. Did you talk to anybody then in San Francisco on that trip about the quarry? [46]

A. Well, I don't remember just what conversation I had with Mr. Brown, but I do remember the conversation I had with Mr. Potter on Monday morning, and that is I told him that the thing was just practically hopeless and that we would have to—that something else would have to be done, and he said, "Well," he said, "the thing for you to do is to move over in the gravel."

Q. Now, so he ordered you to continue to work up there; is that correct?

A. No, he didn't order me to continue to work. That would be presumed, that I would have to keep working to meet the contract.

Q. Well, you had a conversation with him about the quarry? Your idea was that the quarry wasn't suitable, and what did he tell you to do about it?

A. Well, he told me the thing he thought I ought to do was to move over in the gravel. He said, "You have got to move anyway. The better headway over

(Testimony of Homer G. Johnson.)

there will offset the difference in cost", or something of that sort.

Q. Did you object to the suggestion?

A. Yes. I said, "That might be all right but who is going to pay for all that expense, like the haul-back to the other plant, and all of that, the dividing line, and so forth?"

Q. Did you follow Article 15 and make an appeal from the ruling of Mr. Potter on that score?

A. No.

Mr. Lichty: We admit that there was no appeal made from any [47]] ruling at any time. Now if that is what you want you have got it in blanket.

Mr. Langley: Q. Your whole contention here, Mr. Johnson, is that this quarry was not suitable to produce rock; is that correct?

A. Now, not only not suitable but it was not what—in other words, our main contention is that they didn't take the stuff.

B. Because it did not meet contract specifications; is that correct?

A. Well, in other words they just refused to take their material.

Q. Well, now then, there must be one of two reasons for that. Either your method of operation was faulty or the quarry was not good. Now which is it?

A. Well, the quarry wasn't good.

Q. All right. So, then, your contention all the way along is that this quarry was not good; is that correct?

A. Yes.

(Testimony of Homer G. Johnson.)

Q. And the Government's contention was that the quarry was good; that is correct, isn't it?

A. What is that?

Q. And the Government's contention all the way along was that the quarry was all right?

A. Yes, I think that is part of their contention.

Q. And this was the quarry that was mentioned as three-tenths of a mile right of Station 1239 under the contract, wasn't it? [48]

A. Yes.

Q. In other words, this was a question arising under your contract as to whether or not this particular spot that you began operations was a fit quarry; isn't that correct?

Mr. Lichty: I object to that again as argumentative.

Mr. Langley: Q. Isn't that your position?

Mr. Lichty: I object to that as argumentative.

The Court: He may answer.

The Witness: I didn't get the question.

The Court: We will take the noon recess now.

When do you want to start in again?

Mr. Lichty: At your Honor's convenience.

The Court: When do you want to start in?

Mr. Langley: Well, one o'clock. I think we will have to hurry if we are going to finish today.

Mr. Lichty: We won't finish today. There is not a chance.

The Court: Well, we will start at 1:30. You will have to allow yourself two days.

(Testimony of Homer G. Johnson.)

Mr. Langley: Before we adjourn I might say this in all fairness to everybody. There is a recent case decided by the United States Supreme Court, decided April 10th, 1944, entitled *United States vs. Algernon Blair*, which, in my opinion, is absolutely controlling in this case.

Mr. Lichty: *United States versus whom?*

Mr. Langley: *Algernon Blair*. It is the first time the Supreme [49] Court has really considered this Article 15 of the contract I am just talking about in my examination here, and I think it absolutely controls this case.

The Court: What is the date of the decision?

Mr. Langley: April 10th. Now I don't know whether you have it in your office.

The Court: I don't either at this moment. How do you keep so close up on the Supreme Court's opinions?

Mr. Lichty: I will tell you, these Government engineers always have their ears to the last decision as to any of their contracts and they know it before it is out of the court.

(Thereupon, at 12:00 o'clock noon a recess was taken until 1:30 o'clock P. M. of this day, Tuesday, April 18, 1944, at which time Court reconvened and the following further proceedings were had herein:)

The Court: Proceed.

(Testimony of Homer G. Johnson.)

Homer G. Johnson, the plaintiff, resumed the stand as a witness on his own behalf and further testified as follows:

Cross Examination (continued)

By Mr. Langley:

Q. Mr. Johnson, this I have here is plan and equipment questionnaire. It is Plaintiff's Exhibit No. 22, and on the last page there are some items of equipment, and you state the present [50] location of them. Now I think you can answer this without any showing. The exhibit says that these things were in Portland, Oregon. Where were they in Portland, Oregon, do you recall?

A. Well, my warehouse is over on Greeley Avenue, and most of the stuff was over there.

Q. Stored over there, was it?

A. Well, stuff comes in and out all the time. It is around there.

Q. Now then this 15 by 36 jaw crusher you stated was in Portland. Was it in Portland or was it out on a job?

A. No. That was in Portland.

Q. And this three foot cone crusher; was that in Portland or was that out on the job?

A. Well, I think that one was here, as near as I remember.

Q. And this 20 by 40 Pioneer Roll Crusher, was that in Portland?

A. Yes, that was in Portland.

Q. And this air compressor, was that in Portland?

(Testimony of Homer G. Johnson.)

A. Yes, I think that was—I have almost forgot where that was at, but I think it was here. That was a belt-driven compressor we had down there and we were doing some work about the time that work was awarded. We were finishing a job over in Washington and we had two little portable compressors over there and they were rented.

Q. You say about the time you were starting this job you had a job in Washington?

A. Well, about the time the job was bid. It was finished shortly after that. [51]

Q. Where was the job in Washington?

A. Over near Chehalis.

Q. What was the name of the superintendent on the job?

A. Well, I think my brother was the superintendent. His name was Holly Johnson.

Q. Was it a job with the State of Washington?

A. Yes, that was with the State of Washington.

Q. Do you remember the name of the man you had contact with that represented the State of Washington on that job?

A. You mean—who do you mean, Resident or District engineer, or who?

Q. Well, just the name of any of the Washington men that represented the Washington State Commission on this job that you were working on over there.

A. Well, E. C. Simpson, of Vancouver, was the District Engineer.

(Testimony of Homer G. Johnson.)

Q. I see. And when did you finish that job, do you remember?

A. Well, I think it was finished in the early days of July; somewheres along there.

Q. This Austin No. 77 Diesel Motor Patrol, was that in Portland?

A. Well, I don't know. I have got quite a few motor graders. At that time I think we had four or five and I don't remember now just which grader it was—which exactly. They switch around.

Q. How about the five yard trucks that you list on this as being in Portland? Were they in Portland.

A. Well, I had the trucks here, yes. And Mr. Thomas, who does [52] a lot of trucking, he had trucks here and he was trucking up on that job also and he had trucks up there, so I don't know just where all the equipment was.

Q. Well now, Mr. Johnson, isn't it a fact that the reason you didn't get started on this job in California was that you hadn't finished the job up at Chehalis?

A. No. That had nothing much to do with that job down there, because my brother was the superintendent up there and Mr. Hildeburn was going to be superintendent in California and there was going to be two different distinct outfits, so—

Q. When did you get your equipment down on your California job?

A. Well, the compressor went down there right after Mr. Hildeburn went down there on the last

(Testimony of Homer G. Johnson.)

days of June. Of course that was the first thing to have there, because you couldn't do very much until after the quarry was shot on account of having to put the plant out in front of the quarry and if you shot the quarry there and have the plant in the way they are liable to shoot the plant all to pieces, which frequently is done.

Q. Do you remember when your Austin No. 77 Diesel motor grader got down there?

A. Well, I don't know. However, that wasn't in there until after the crushing plant was running, all ready to run, so that—

Q. When did you crushers get down there?

A. Well, they got down there sometime in July, in the early days—in the middle of July, somewhere around there. [53]

Q. Do you remember the date, the approximate date?

A. Well, don't remember exactly in particular. There were several truck loads of stuff, and, as I remember, we shipped some stuff on the railroad, and of course we sent the things as they were needed and some things that were not going to be needed until the last they didn't go until the last, and things that were needed to start with were sent. In other words, as the things were needed we got them out without delay.

Mr. Langley: That is all I have.

Redirect Examination

By Mr. Lichty:

Q. Mr. Johnson, counsel interrogated you quite closely this morning on whether or not you had any

(Testimony of Homer G. Johnson.)

arguments with the District Engineer or the Resident Engineer there, rather, on the quality of the rock in that quarry. Had the rock in that quarry all been of the same character as the exterior, hard, brittle rock, would your cost of doing this job have been less or greater than it was with the soft rock you encountered?

A. Oh, it would have been much less except it was—in other words, the harder the rock that was there the better it would crush.

Q. How about the time of performing the job? Would that have been materially lessened?

A. Well, certainly the more yards you get through every day the more quickly you are going to get done. [54]

Q. You never did think, did you, that the material you were actually putting on that road was up to specifications? A. No, we never did.

Q. There was too much soft material in it always?

A. Yes; in other words, to make a good road and to be good crushings. Now in some quarries we have encountered in years of operation, where you strike soft rock conditions would be altogether different. You probably would crush it faster. But that stuff, as you struck that soft rock it would ball up on this roll crusher and wouldn't go through nearly so fast, and it would damage that roll and break the roll, and we had on these breakdowns much delay, of course, two to three days or four days every time it happened. In some quarries that

(Testimony of Homer G. Johnson.)

we have run across soft rock in the softer it is the best it goes through.

Q. In other words, if it is not flint?

A. How is that?

Q. I say, flint would be harder to crush than medium hard rock?

A. Well, it all depends on the rock. Sometimes the hard rock is more brittle and will go through freer than a softer tough rock.

Recross Examination

By Mr. Langley:

Q. Did you ever tell the people in San Francisco that you didn't think this rock was up to the contract specifications?

A. Well, I told them the same effect to that.

[55]

Q. You are interested in doing a good job always, aren't you?

A. Well, yes. We try to have them pleased. Of course, they are not pleased unless they do get a good job.

Q. And so this man Wood down there in the South Pacific fighting is not up here. You know he would not allow you to put that on there if it was not up to the contract specifications?

Mr. Lichty: Where is Mr. Wood, you say?

Mr. Langley: In the South Pacific.

Mr. Lichty: Fighting?

Mr. Langley: Yes. Isn't that right?

Mr. Lichty: Carrying a flag, is he?

(Testimony of Homer G. Johnson.)

A. Well, that is why he had his superiors come up there and take a look at it in order to pass on it. He was done and that is why he sent for them.

Mr. Langley: Q. But you never told his superiors that you didn't think this material was meeting the contract specifications, did you?

A. Well, I went down to see Mr. Potter there when I made that special trip to San Francisco. I told him, well we couldn't use it and the stuff wasn't any good and blamed Wood for not taking it, and we had just—the quarry had just played out and there was no chance to do anything farther there.

Mr. Langley: That is all.

Mr. Lichty: That is all.

(Witness excused.) [56]

Mr. Lichty: Call Mr. Hildeburn.

HARRY HILDEBURN

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. What is your name?

A. Harry Hildeburn.

Q. H-i-l-d-e-b-u-r-n?

A. That is right.

Q. Mr. Hildeburn, were you the superintendent

(Testimony of Harry Hildeburn.)

for Mr. Johnson on that job that is in question here? A. Yes.

Q. Mr. Hildeburn, when did you first meet Mr. Wood, the Resident Engineer on that job?

A. The time that Mr. Johnson and Mr. Thomas and myself went down to look at the job the first time.

Q. You stayed down there just that one day, did you? A. That is right.

Q. You returned to Portland, and then when did you return to the job?

A. Well, approximately a week later.

Q. What equipment did you take down with you at that time?

A. Well, I don't know as I took it with me. It was shipped so it [57] would arrive there about the time I did.

Q. That is what I am referring to.

A. It was a compressor and drills and small tools of all kinds.

Q. Now on a job of that character what is the first work to be done?

A. Well, to clean up the face of the quarry and any place where we were going to put a coyote hole in, use that method of shooting, put in the coyote hole and get it ready for the shot.

Q. Did you take men with you? A. Yes.

Q. For the purpose of doing that?

A. Yes. I might add, outside of the equipment that we took down I immediately made arrangements for a hired shovel that we rented for a few

(Testimony of Harry Hildeburn.)

days to come in there and clean up the tailing that was sliding in front of the quarry so we could actually get out the hard rock face. But that was not our equipment. That was a rented piece of equipment.

Q. Was Mr. Wood present when you got back on the job? A. He was on the job, yes.

Q. Was he present when you started your coyoting operation?

A. Well, the first thing I did when I landed there was to look up Mr. Wood and I believe we rode over the entire job together and saw all of the job.

Q. You visited the site of this quarry?

A. Yes. [58]

Q. And he pointed this out as the quarry?

A. Yes.

Q. Did he ever make any objection to your manner of drilling this quarry? A. No.

Q. Now just tell the Court what happened, what you discovered in the coyoting operation.

A. Well, to begin with, this quarry was a very fine looking quarry. From the contractor's point of view it was a beautiful quarry. The rock was reasonably small, well laminated and brittle. You would hit a piece of it, it would ring like a bell, denoting that it was hard; and, as I say, it looked like very nice crushing material; and, in fact, we were very much pleased with the quarry. Then we started this coyote hole and got in about approxi-

(Testimony of Harry Hildeburn.)

mately thirty feet when the coyote man, the powder man, complained about his drills plugging up, but I didn't take that seriously because I thought it was just a little dirt seams, or something clogging his drill up, and then we got in about, oh, somewhere past forty feet when he told me one day——

Mr. Langley: Now, just a minute. I am sorry, but I will have to ask you just to tell what you know.

The Witness: Well, I know this.

Mr. Langley: Well, you said he told you.

The Court: That is how he learned it. Then he went and looked for himself. [59]

Mr. Langley: All right, if you looked for yourself that is fine, but please don't say what somebody else told you unless you checked it up yourself.

The Witness: Yes. We got in about forty feet and this powder man came to me and was bragging about how much coyote hole he made that day. He told me that he had gone about thirty feet in that day, and I knew that that was impossible for a man to go in thirty feet on a coyote hole in one day, so I told him he was mistaken. "Well," he said, "go measure it for yourself."

Mr. Langley: Now can't we keep out this other man's conversation?

The Court: Well, it doesn't matter. He was bragging about his footage.

A. (Continuing) Well, in the end I went inside of the coyote hole myself. A coyote hole is small and you have to crawl in. You don't go in any

(Testimony of Harry Hildeburn.)

faster than you have to. But anyway I went in to check up on the footage he claimed, and he had actually made this footage, and then I commenced to suspect that something was wrong, so I questioned him about his drilling and why he was making such good progress, and he said, "Well, that stuff is easy to drill. I can just push a drill right into it." He says, "It is getting awful soft." So then I went in with him and watched him drill it. We were drilling with a jackhammer, and ordinarily it will take several minutes to drill a jackhammer hole approximately two and a half or three feet deep. In that rock he would go in [60] there in the matter of a few seconds. He would just walk right in. And then we got to investigating the rock and found that this rock was very, very soft back there, and we sampled it and it just gradually was getting softer from about thirty feet in; you could notice it getting softer from a point about thirty feet from the face until back where he was. However, it seemed to reach its peak of softness at about,—oh, in the neighborhood of fifty feet. I don't know as it ever got any softer from fifty feet on, but it was very soft at that point, and I was very much perturbed about the softness of this rock and I immediately went over and got Mr. Wood and he come over and he was also disappointed in the rock and he told me that he would get in touch with the higher authorities in San Francisco, which I presume that he did.

(Testimony of Harry Hildeburn.)

Mr. Langley: Now let's stop that presuming stuff.

Mr. Lichty: Q. Well, he said that he would get in touch with the higher authorities?

A. Yes.

Q. What happened after he told you that?

A. Well, the reason I presumed was the higher authorities showed up on the job within a couple of days after that.

Q. Did they go into the coyote hole and look this over? A. Yes.

Q. Who were they, do you know?

A. The gentleman sitting on the left—I just can't recall his name at this moment—was one of them. [61]

Q. What is his name? Mr. Steele?

A. Mr. Steele. That is right.

Q. Well, after they had examined the coyoting operation, what did they tell you about proceeding with the work there?

A. Well, they come to the conclusion that—

Q. What did they tell you?

A. They told me they thought we could get enough rock out of there if the soft rock was properly mixed with the hard rock.

Q. Did you then put your cross-shafts in?

A. Yes.

Q. To prepare to shoot? A. Yes.

Q. And you did shoot?

A. And we did shoot.

(Testimony of Harry Hildeburn.)

Q. Now explain to the Court what happened during your pouring operation there, and crushing, and relative to encountering soft material and the difficulty with it.

A. Well, after the quarry was shot we started in erecting the plant. Well, we got done a little work on the plant previous to shooting the quarry, but not too much on account of the possibility of shooting the plant down, but we had our foundations in and lumber on the job, and I think—I believe we had the bunker up previous to the time we shot the quarry but we hadn't put in any crushers because our crusher was going to sit directly in front of the quarry, and belt conveyors carrying the rock from the crusher up into the [62] bunkers, and of course that could be very easily shot down if it happened to blow out at all. But, however, we shot the quarry and it didn't blow out and it would have been perfectly safe had we had our plant up because it was a nice shot. It raised the entire hillside up there three or four feet and dropped it right back again. A man could have been standing any place except right on top of it and been perfectly safe. So it was a very satisfactory shot. It didn't blow out.

Q. It didnt' blow out any hole? A. No.

Q. You then got your crusher and conveyors in position and started to operate?

A. We then put in our dragline and started to operate and everything was fine and running along in good shape for—well, I don't just recollect how

(Testimony of Harry Hildeburn.)

many days but for several days. Of course, in the meantime we had the little bugs to take out of our plant. A belt would run crooked here and little trivial things of that kind, you know, that had to be taken care of. But I would say that we ran along for four or five days up to a week before we actually encountered some of this soft rock and at that time we moved the dragline over. Now I don't know whether we moved on our own account or whether I was requested to move by Mr. Wood, but after we got down in the trench, oh, a matter of ten or twelve feet, we did move and just moved our tail holt every time the dragline bucket dug a new trench. [63]

Q. Moved what over?

A. The dragline bucket.

Q. When you moved your tail hold?

A. Tail holt, that's h-o-l-t, yes. That is the tail that brings the bucket back and forth, you see.

Q. That is spelled h-o-l-d, isn't it?

A. Yes, that is right. Then we worked our way entirely across the quarry, but from time to time we would be stopped on account of hitting soft rock and we would get a little too far down in the trench. Mr. Wood would stop us. Sometimes we were only stopped for five minutes, other times we would be stopped for a couple of hours, and many times we would be stopped at the scales with a load of rock and the checkers and weighers with scales would get up on the load of rock and look at it,

(Testimony of Harry Hildeburn.)

and then you see if a load of rock came in there that didn't happen to weigh up to standard, if there happened to be a few hundred pounds light they would be suspicious that there was some bad rock in it and they would commence digging around in the rock. Of course that smaller weight would be a smaller load. We did try to keep our loads uniform and they would run within a few hundred pounds of each other as a general proposition.

Q. Were there many occasions where you had loads that had to be dumped or rejected?

A. Quite a number. Quite a number.

Q. Now were you able to produce any oil rock during your run at [64] that quarry? A. No.

Q. Give the Court the reason for that.

A. Well, it would have been impossible to have produced oil rock from it because there was a lot of this soft rock coming in at all times. The bucket would pick up a little soft rock occasionally in the bottom of the trench, and then in the back of the quarry that soft rock run higher up. This quarry face was approximately about, oh, twenty-five to thirty feet high right at the face from the level flat around the creek and then it gradually increased in height to a height of about, I would say about twelve percent grade, from there to the back of the quarry. From the top of the front face back it increased in grade but toward the back the rock was not so good, even on top of the ground.

Mr. Lichty: May I have the pictures that are in evidence here. Will you hand him this picture.

(Testimony of Harry Hildeburn.)

Q. Will you read me the number of that exhibit. It says Pre-Trial Exhibit number what?

A. Number 1.

Q. Number 1. Examining Plaintiff's Pre-Trial Exhibit No. 1, does that represent the back of the quarry where you say the soft rock was?

A. The left-hand side of the quarry. The right-hand side of the picture would probably be the back of the quarry, the extreme right-hand side, but I—— [65]

Q. That back wall that you see in there, is that typical of the rock you encountered on the back edge?

A. Yes, I think it would be. I think that is right.

Q. Was that rock along there in your opinion proper rock for road-making purposes?

A. Well, I think there would be a little good rock in that where it actually shows up in the picture. You can see a little good rock there yourself. But you can see right back of that good rock it showing up in the form of mud, and there is no indication in this picture that it is rock at all, but there seems to be a space there ten or twelve feet wide that looks as though it was pretty good rock.

Q. About ten or twelve feet wide?

A. But you couldn't tell from this picture whether it was good or bad. I wouldn't attempt to say.

(Testimony of Harry Hildeburn.)

Q. You know from your experience there when you left that quarry. Was the material along the vault of the quarry to the point where you had excavated it satisfactory material for crushing and road-making?

A. Well, we left a little point of good rock in that quarry. That was true right back of the bunker, because we couldn't shoot it on account of the bunker. The bunker was right against the face—not right against it but too close to it to make it possible to shoot it with any degree of safety.

Q. There was a little good rock? [66]

A. There was a little good rock, yes, because we had set our bunkers right alongside of the face on the left-hand side. But, oh, I don't believe there was over a thousand yards at the very outside of good rock that was left.

Q. Mr. Hildeburn, how long have you been engaged in contracting operations in the States of Oregon, Washington and California?

A. Since 1912.

Q. Have you been a contractor in your own right at times during that period?

A. From 1914 until 1926 I was contracting for myself.

Q. Then you, either as contractor or superintendent, built and constructed similar projects to this in which you were engaged?

A. Well, similar except in the processing on the road. That was our first experience of that

(Testimony of Harry Hildeburn.)

particular method of putting the rock on the road. Otherwise, yes.

Q. Would you say that this quarry in which you worked for Mr. Johnson was an adequate, satisfactory quarry for that job?

A. To begin with, yes. It had all the earmarks of being a beautiful quarry.

Q. But as it actually developed would you say it was an adequate, satisfactory quarry?

A. Oh, absolutely not.

Q. In your opinion did the failure of the material in that quarry to be adequate and satisfactory result in loss and damage to the contractor? [67]

A. Very much so.

Mr. Lichty: You may take the witness.

The Court: About how much in damages, Mr. Lichty, are you going to claim in the event liability is found?

Mr. Lichty: Sir?

The Court: About how much in damages do you expect to claim in the event liability is found?

Mr. Lichty: We will claim just within the statutory amount of this court, your Honor. We will claim \$9,999.99, or the equivalent thereof. The claim that was presented was for more than that—that he presented to the Government at the end.

The Court: Was your claim rejected entirely?

Mr. Lichty: Yes, entirely rejected. Do you have any questions?

Mr. Langley: Well, I am just wondering about

(Testimony of Harry Hildeburn.)

that point there. Well, I guess that is all right for the time being.

Cross Examination

Mr. Langley:

Q. Well now, can you recollect how many times the plant was down because of bad rock?

A. Oh, no, I couldn't recall that but it was down, oh, this would be purely a guess but I would say probably fifty or seventy-five times.

Q. Can you estimate it in number of hours, or anything like that?

A. No, I wouldn't make an attempt to estimate it in hours. Sometimes it would only be down for five minutes. [68]

Q. Can you estimate it in days lost?

A. Well, there was times when it would be down two and three days I believe at a time.

Q. You haven't any definite idea, then, about how many days it was down?

A. No, I wouldn't try to estimate that. That has been seven years ago.

Q. Yes. And you didn't keep any memorandum at the time? A. No.

Q. And just your own recollection is what you are relying on? A. That is all.

The Court: How does this case happen to be brought to a head so late? Seven years ago this all occurred.

Mr. Langley: Yes.

(Testimony of Harry Hildeburn.)

Mr. Lichty: Well, it was brought within the six-year period.

Mr. Langley: Of course, that is one of our claims on this witness being away. Of course he had lots of time to bring it while he was here.

Mr. Lichty: The point is that Mr. Johnson made his claim and was trying to get some action on it and had attorneys in Seattle, who kicked it around awhile, and just when he saw that he was really going to need some action he brought the claims to me. That is the actual fact.

The Court: The matter has been pending for a long while?

Mr. Lichty: Yes. [69]

Mr. Langley: I think that is not accurate, because we turned the claim down. June 15th, 1939, the claim was turned down.

The Court: Yes.

Mr. Langley: Q. Well, was the operation ever covered up by a slide there?

A. Well, no, not the operation. The only slide that it would be possible to have would be a Bagley digging a deep narrow trench and possibly the side of the trench might slide in, or something of that kind, but no sliding of any consequence. That quite often happens with a dragline operation.

Q. Do you remember whether any slides closed the plant down, then?

A. Well, as I say, the possibility of a little slide of that kind that might close the plant down for an hour, or bury our bucket, you see. Suppose

(Testimony of Harry Hildeburn.)

you were coming along digging a trench eight or ten feet wide, eight or ten feet deep, those walls stand pretty high, pretty straight. One of them might cave in on top of the bucket and possibly we might have to use some other method of uncovering that bucket, or something of that kind, which might take an hour or such a matter. That quite often happens in a dragline operation.

Q. There wasn't any trouble with 870? The trouble was all up there at 1239; that is right, isn't it? A. Yes.

Q. That is where all the trouble was?

A. Yes, that is where all the trouble was. [70]

Q. And the trouble there was that from your operation you couldn't meet contract specifications? That is correct, isn't it?

A. Well, we could meet contract specifications as long as our rock held out. Of course, there are many things that enter into meeting contract specifications. It would be a question of quality of rock, a question of grading. We always have just a little difficulty on grading because they call for certain percentages of fines, and one thing and another, and we did have a little difficulty in meeting those fine requirements, I believe, right off of the bat when we first opened the quarry. But that is to be expected, and——

Q. Well, you——

A. Well, let me add, if I may, but that was one of the reasons—that quarry being bad was one of the reasons we couldn't meet the requirements more

(Testimony of Harry Hildeburn.)

easily. Had we been able to make oil rock there we would have robbed out some of the larger sizes which would go into oil rock and that in turn would have increased our finer sizes which we had difficulty in making.

Q. Did you ever try to produce oil rock there?

A. No.

Q. Never even tried?

A. No, we didn't try because we were, right off of the bat we were told it would not be satisfactory for oil rock.

Q. Who told you?

A. Somebody in authority. [71]

Q. Well, who was it?

A. Wood. Wood, for instance.

Q. Well, who else told you?

A. Well, Mr. Steele.

Q. Do you remember the date Mr. Steele was there and told you that?

A. Well, I remember the day but not the date.

The Court: What is oil rock?

A. Oil rock is small rock from a quarter inch to a half inch that is very clean, with no fines in it, that is spread over the top of oil after the oil has been spread on the base. Then you spread this with a spreader box, a very thin coat of it, and that covers the oil and keeps the oil from sticking to the traffic.

Mr. Langley: I can clear that up.

Q. How many kinds of rock were you to produce under this contract? A. Two.

(Testimony of Harry Hildeburn.)

Q. What did they call it?

A. Well, different contracts call it different things but——

Q. Under this contract?

A. Well, I think this was—the first course was called the cover course. I believe that is right.

Q. Is that the same as “crusher”? That is the heavy stuff?

A. Yes, that would be the heavy stuff.

Q. Than the cover material or chips, that is the fine stuff?

A. That is the oil rock. [72]

Q. You mix that with oil and put it on?

A. No, you don't mix it with oil. The oil was spread on the road and then the truck backs up and spreads the chips over the top of it.

Q. Did you keep any production records as to how much you were producing there?

A. Well, no, I don't believe so.

Q. When you moved from the so-called first face to the second face do you know how much crusher run you had produced when you made the move?

A. Over the first face, or under, or in comparison with the two faces?

Q. Yes. At the first face how much had you produced?

A. I don't recall just what we were producing. Somewhere in the neighborhood of a thousand tons a day. I mean by a day in three shifts. Somewhere in that neighborhood.

(Testimony of Harry Hildeburn.)

The Court: Why couldn't you get oil rock out of this quarry?

A. Because this rotten rock would come in and contaminate the good rock, and of course if any of that got into the oil rock it would ruin it.

The Court: Why? How would it ruin it?

A. Well, in other words, we will call this rotten rock a piece of clay, and if you put a piece of clay in your oil rock and it is spread on top of the oil and then your roller comes along and rolls that into the oil, why, your roller would immediately [73] mash this rotten rock; then you would have a space there of an inch or two inches that would be nothing but a clay spot and would immediately fade out under the traffic.

The Court: It has to be uniform and hard?

A. It has to be uniform and good rock. It is the best rock we can produce to qualify as oil rock.

Mr. Langley: But you didn't try to produce any? There was no test ever run on any? Is that correct?

A. Oh, no. No, no. From experience we knew we could not produce it.

Q. You were relying upon your own judgment, then, to some extent, weren't you?

A. No. I testified a while ago I was told we would not be allowed to use that for oil rock.

Mr. Langley: That is all, your Honor.

Redirect Examination

By Mr. Lichty:

Q. Mr. Hildeburn, one question or two. There

(Testimony of Harry Hildeburn.)

were delays occasioned, I believe, by the breaking of the roll shafts of the crusher. What would occasion that breakage?

A. Well, we broke four shafts during the operation, and the reason that we broke them, why—well, it is my belief that the reason that we broke them, at least, is that this dead sticky material would build up on the rolls, and you see when a roll's crusher crushes rock the rock is riddled and it is broken [74] into fragments and gravity drops it away and the rolls clean themselves, but when this sticky material would come in it would mash all right and stick to the rolls and build up and build up until the safety factor in the rolls, which is a very enormous spring, would spread out until there was no safety factor left and then you had two immovable objects there coming with great power and there was no chance for any safety factor and it would lock these shafts and break them.

Q. Did you ever have any experience in shafts of a roll crusher breaking before?

A. I never heard of a roller shaft ever breaking before and none in my experience on any job.

Q. Have you ever observed any roll shafts break since then?

A. We have crushed in the neighborhood of three million yards of rock in the last three years with roll crushers and we never have broken a shaft.

Q. Now counsel keeps speaking of face number two and face number one. Did you folks ever con-

(Testimony of Harry Hildeburn.)

sider the second quarry you opened as another face of the same quarry?

A. When we first started there?

Q. No. I say, he speaks of face number one and face number two. Did you ever consider the second quarry that you opened as a face of number one quarry?

A. Oh. Definitely no. Face number two, as you are designating it here, was just a dirt hillside, covered with timber.

Q. Where you found some rock later? [75]

A. Where I found rock later, yes, in desperation looking for rock. It had finally got to a point where we had definitely closed down and the job was stopping for the want of rock and taking a long chance I took the shovel up—I saw a little outcropping of talus slide of good rock up there, is how I came to go into that particular spot, and I took a shovel up there and prospected for it and we were fortunate enough to find it.

Q. Did Mr. Wood locate that for you?

A. No.

Q. Did he ever suggest there was any rock there?

A. No; and, on the contrary, he sort of ridiculed the idea. I told him I thought I would go up there and prospect for rock and he laughed at me. He kidded me about going up there but I went up anyhow.

Mr. Lichty: That is all.

(Testimony of Harry Hildeburn.)

Recross Examination

By Mr. Langley:

Q. Well now, just a minute, please. You say when you went up to this, what you call—I will call it the second face but I understand you don't interpret it as being a second face—you say you noticed that because there was an outcropping up there; is that correct?

A. No. I said I saw a little hilly outcropping at the foot. In other words, just a little piece.

Q. And you discussed this idea with Wood and he sort of ridiculed [76] your going up there, did he?

A. That is right.

Q. Then you didn't apply to the department for authority to move, I take it?

A. That is right. We did not. However, Mr. Wood was very much delighted when we got in there and found good rock.

Q. But you knew that Wood didn't have much authority? You knew the authority was down in San Francisco, didn't you?

A. He had authority enough to accept good rock when he saw it.

Q. So you went up there to that second place right then? Wood didn't have anything to do with it?

A. That is right.

Mr. Langley: That is all.

Mr. Lichty: That is all, Mr. Hildeburn.

(Witness excused.)

T. W. THOMAS

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. What is your name?

A. T. W. Thomas.

Q. What is your occupation or business?

A. Oh, subcontractor, subcontracting on road work, [77]

Q. You specialize somewhat in trucking, do you not? A. Yes, sir.

Q. Were you operating trucks for Homer Johnson on the case that is before this Court on that road project? A. I was.

Q. Did you observe the operations of the quarry located approximately three-tenths of a mile right of Station 1239? A. Yes, sir.

Q. Did your trucks, under your immediate supervision, haul most of the material that was spread on the road there? A. Yes, sir.

Q. What, Mr. Thomas, was the general quality of the rock that was spread on that road?

Mr. Langley: Maybe he should qualify, if he has had experience.

Mr. Lichty: All right.

Q. Mr. Thomas, how much experience have you had in road construction work?

A. Oh, about twelve or fourteen years.

Q. In that time have you owned and operated

(Testimony of T. W. Thomas.)

gravel trucks in spreading gravel upon highway construction work? A. I have, yes, sir.

Q. That has been your principal business, has it?

A. That is right.

Q. Mr. Thomas, observing this operation of Mr. Johnson's crushing plant, what did you observe as to the quality of the rock that was [78] being produced at that rock quarry?

A. Well, as I remember, we worked, oh, possibly two or three weeks and I heard no complaints and the rock seemed to be O.K., and then it started. My first notice was the delays at the weighing scales, you know. They used to hold the trucks up, oh, anywhere from five to ten minutes and possibly longer, testing the rock out to find out whether it was good or bad, and some of it they would dump along down through the woods close to where we were working and some of it they would take to the road. I was more interested in that part of it than anything else, because—

Q. You were interested in and getting paid for good rock in place on the road?

A. That is right.

Q. Were there numerous or only occasional times when the plant would be shut down while they were moving and trying to find hard rock?

A. I didn't understand the first part of that.

Q. Were the occasions numerous or merely infrequent where they would have the plant shut down while they were trying to prospect for good rock?

A. Yes, it was quite numerous. Of course, it

(Testimony of T. W. Thomas.)

seemed to me like quite a long time, but it seems to me like it was over a period of two or three weeks this was going on.

Q. Do you, Mr. Thomas, have any independent knowledge of the quality of this rock? [79]

A. Oh, I can't say that I have at this long date away.

Mr. Lichty: That is all.

Cross Examination

By Mr. Langley:

Q. The thing that you observed was there that the rock produced didn't meet the specifications under the contract, so they were turning it down; is that correct? A. That is right.

Q. Then the difficulty there was they kept keeping Johnson there and he couldn't produce it? Isn't that about the size of it?

A. Well, I don't know what the trouble was; I couldn't say. But I know the trouble was they wouldn't accept the rock and held us up during this period of time.

Q. Did you haul rock from what I call the second face there?

A. Yes. I hauled all the rock on both setups.

Q. How far do you think it was from the first face to the second face?

A. Oh, somewhere around six hundred feet, I imagine. I couldn't say.

Q. How do you arrive at that determination?

A. Oh, just my remembrance of it.

Q. Just a guess? A. Just a guess.

(Testimony of T. W. Thomas.)

Q. You didn't measure it, did you?

A. No. [80]

Q. Were you there, or were just your truck-drivers there?

A. I was there most of the time.

Mr. Langley: That is all.

(Witness excused.)

C. JACKSON ELDON

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. You are C. Jackson Eldon? A. Right.

Q. Mr. Eldon, what is your business?

A. I am classed as a general contractor.

Q. How long have you been operating as a general contractor in and around the City of Portland?

A. Well, most of the time since 1907.

Q. Is the partnership of Joplin & Eldon still in existence?

A. The partnership of Joplin & Eldon is being liquidated at the present time.

Q. That partnership has been in existence for how many years? A. Since 1921 until 1941.

Q. In that period of time, Mr. Eldon, have you, as a contractor, performed many contracts for the

(Testimony of C. Jackson Eldon.)

Bureau of Public Roads, State Highway departments of Washington and Oregon? [81]

A. Yes, quite a few.

Q. You have in that time quarried, crushed and spread on the highways of these states a considerable yardage of crushed rock?

A. Yes, quite a large yardage of crushed rock.

Q. Mr. Eldon, you have before you a specification submitted with the proposal for bids, reading as follows: "Sources of Supply. Gravel for crushing is available approximately five-tenths of a mile right of Station 870 and rock for crushing is available approximately three-tenths of a mile right of Station 1239. Unless otherwise specifically approved in writing by the engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer." That specification involved the construction of a highway, grading and servicing approximately sixteen and a fraction miles in length. Your Station 1239 is approximately four miles from one end of the job and your Station 870 is located approximately four miles from the other end of the job. This construction project contemplated the spreading of base material and an oil surface on top of that. Having before you that specification, would that representation therein as to the location and availability of rock for that job be a material factor in making your bid?

(Testimony of C. Jackson Eldon.)

A. You read the clause about the availability of the rock and the limitation applying to that.

Q. "Sources of Supply. Gravel for crush- [82]
ing is available approximately five-tenths of a mile right of Station 870 and rock for crushing is available approximately three-tenths of a mile right of Station 1239. Unless otherwise specifically approved in writing by the engineer only materials from the above sources shall be used for crushing."

A. Now just what is your question? Repeat that.

Q. My question is, having in consideration the project that I have described and the specification I have described, would the representation in the specifications of the availability of materials at those spots be a material factor in figuring your bid?

A. Definitely so.

Q. Mr. Eldon, suppose that it turned out that the quarry located approximately three-tenths of a mile right of Station 1239 consisted of an overlaying of a narrow facing of hard rock, we will say, ten to twenty feet, and as you go into the quarry you encounter soft material which will ball up on a roll crusher, would you say, Mr. Eldon, that such a quarry would be a quarry which complied with the specifications that the specifying officer agreed to provide?

A. Let me ask a question. Was it a known fact at the time that that was the nature of the quarry?

Q. We are disregarding that, Mr. Eldon. I am merely asking you, if it developed that the quarry

(Testimony of C. Jackson Eldon.)

was such as I have described, had soft rock with an overlaying of hard rock, would you say that the specification that rock is available for crushing [83] at that station, would that kind of a quarry in your opinion comply with that specification?

A. I would not consider that to be in accord with the representation made in that preceding paragraph.

Q. Is such a quarry as I have described, Mr. Eldon, in your opinion, a quarry fit for the purposes that I have indicated, for the construction of a road project, and particularly one that requires oil rock surfacing?

A. I would not think so.

Q. In good contracting practice would that be a good rock crushing quarry?

A. I wouldn't think so.

Q. Mr. Eldon, will you explain to the Court if you know why it wouldn't be—first, I will ask you, would it be possible or reasonably possible to produce oil rock from such a quarry?

A. It might be possible but it would be impracticable—impractical. It is possible that some of the rock may have been picked out to produce some oil rock but it is wholly impractical from a contractor's standpoint.

Q. It would be highly expensive then?

A. Well, it would be so expensive it would be prohibitive.

Q. Now will you explain to the Court why that is your opinion.

(Testimony of C. Jackson Eldon.)

A. Oil rock is rock that is produced to cover an oiled surface, and the insistence is that this road material shall be hard and will stand wear. I [84] think most of the places they provide it shall not show a loss on the abrasion test, Los Angeles test, of a certain percentage. When you mix the soft rock with it it is quite difficult to remove the soft rock and any little bunch of soft rock that gets on the oil has a tendency to disintegrate and the oil will pit out, make pockmarks in the oil, making the road surface rough and subject to the action of traffic and the weather at the same time.

Q. Mr. Eldon, in your opinion, having before you Plaintiff's Pre-Trial Exhibit No. 26 showing the exposed face of the quarry before it was shot in this case, would you say that a dragline operation on that quarry would be in conformance with good contracting practice?

A. A dragline method of bringing rock to a crushing line is the cheapest and easiest method of producing it regardless of what the quarry is, if you have a dragline show; that is, an opportunity to use the dragline.

Q. Is that a normal dragline show that is depicted there?

A. Apparently on the face it would be a dragline show.

Q. And the use of a dragline would be in conformity with good contracting practice?

A. Well, that is what I would think of. Doing

(Testimony of C. Jackson Eldon.)

it myself that is what I would think of the first thing—a dragline.

Q. Now in shooting that quarry what would be the customary and usual practice in good contracting circles of drilling and shooting a quarry? [85]

A. It has the appearance of being—you mean the method of shooting?

Q. The method of drilling and method of shooting.

A. Well, it wouldn't drill. It has the appearance of being a case where you would drive a tunnel and use a—use what we call in contractor's parlance coyote holes, and shoot them with coyote holes.

Q. Would there, in your opinion, be anything that is unusual in the line of any contractor's shooting that quarry by coyote holes?

A. No. On the other hand it would be unusual if he didn't use that method.

Q. Mr. Eldon, assuming that in the production of material from the quarry in question the material would ball up on the rolls of the roller crusher, causing the breakage of three to four roll shafts, what in your opinion would such an incident indicate relative to the quality of the material in the quarry?

A. I never had that happen. I can't answer that from experience. I have never had anything like that happen. In fact, I have never had a crusher roll shaft break. In order to cake on the rolls dense enough and tough enough to cause a strain sufficient to break a shaft, I would think it

(Testimony of C. Jackson Eldon.)

would have to have more or less the consistency of hard rubber.

Q. Can you imagine a clay that might do that?

A. I presume there are clays that would do that.

Q. Mr. Eldon, assuming that you encountered material in your drilling operations and crushing operations that would cause that, would you say that such a material was satisfactory material for the construction of a road such as I have described to you?

A. Well, no. I would not think so.

Q. Would the presence of such materials materially retard the progress of crushing operations?

A. It might. It probably would slow it up to the extent of fifty per cent of it going through the crusher. If it was that sticky it would stick to the crusher jaws, to the cone head or mantle, and you would expect it to stick to everything.

Q. Would it in your opinion materially increase the expense to the contractor in performing his contract?

A. Well, I presume he could perform a contract like that, but I do not know whether he could or not with that kind of material.

Q. But if he did would it materially increase his expense?

A. Oh, yes. It would be very expensive to do that.

Mr. Lichty: You may have the witness.

(Testimony of C. Jackson Eldon.)

Cross Examination

By Mr. Langley:

Q. Did you ever go down and look at this place we are talking about? A. No, sir.

Q. Did you talk to Mr. Lichty about this case before you went on the stand?

A. He asked me if on the specifications, if [87] that was a definite location. I told him it was, I would consider it a very definite location.

Q. So you knew what you were going to testify to before you got on the stand, didn't you?

A. No, sir. I knew that.

Q. You knew what you were going to testify to about this specification, didn't you?

A. I knew I was going to testify and if I was asked the question I would say definitely that was a definite location.

Q. You said this specification was a misrepresentation, as I understand it. It would not be a misrepresentation unless the Government knew more about it than the contractor, would it?

Mr. Lichty: That is not the question I asked.

The Witness: Pardon me, I didn't say it was a misrepresentation.

The Court: He said as it was represented.

The Witness: I said as it is represented.

Mr. Langley: Q. Let me ask you this question: If the Government didn't know any more about it than the contractor and it developed there was some soft rock in there, would you say the Government had made a misrepresentation?

(Testimony of C. Jackson Eldon.)

A. If they represented there was suitable rock there and there proved not to be suitable rock there, that would be not—I wouldn't say "misrepresented", but they had misrepresented there would be available rock—there would be available [88] suitable rock there.

Mr. Langley: I think the Court would be a better expert than Mr. Eldon on that point.

Q. Mr. Eldon, assuming that this particular spot we are talking about produced eleven thousand tons of crusher-run material, would you say that it would have been practical to produce cover material during that operation when they were producing the eleven thousand tons?

A. Will you distinguish between crusher-run and cover material?

Q. Yes. Now as I understand your testimony from the hypothetical question that Mr. Lichty asked you, you said it would have been impractical to produce cover material. Now I am asking you, assuming that they produced 11,000 tons from this particular spot of crusher-run, 11,000 tons of crusher-run, would it have been impractical to have produced cover material at the same time?

A. I want to make myself plain. If there was soft material such as is described, it is impracticable to produce oil rock with that soft material in the quarry.

Q. But you are familiar with the specifications for crusher-run material, aren't you?

A. I am as a usual thing.

(Testimony of C. Jackson Eldon.)

Q. Well, if you meet the specifications of crusher-run material for eleven thousand tons, would it be impractical to produce crusher-run at the same time?

The Court: No, not crusher-run. [89]

The Witness: The crusher-run?

Mr. Langley: I mean cover material.

A. Yes.

Q. It would be impractical?

A. Impracticable.

Q. Why?

A. Engineers as a usual thing allow a great deal more latitude in what we call base or crusher-run materials than they do in oil rock. Contractors assume a certain license in producing crusher-run or base course materials. In fact, they are required in many cases to produce a base course material, a great percentage of which will pass a low or a small opening screen and in a lot of cases they say a certain percentage of that may be dirt or sand. Crusher-run material is simply taking a quarry and whatever comes out of the quarry is crusher-run.

Q. Let me ask you this question: Assuming that you had 11,000 tons of good rock before you ever got to any soft rock, would it have been impractical to produce cover material?

A. It is not impractical to produce cover material or oil rock when you have good rock, whether you have eleven thousand tons, ten tons, or a million tons. The idea of producing oil rock is that you must have good material from which to produce it—to produce it practicably.

(Testimony of C. Jackson Eldon.)

Q. Yes. Are you familiar with the specifications of the State of Washington that they use in a typical case like this? [90]

A. I am fairly familiar with the general specifications of the State of Washington.

Q. Are you familiar with the 1935 edition?

A. I wouldn't say. I am familiar with practically all of their editions.

Q. The reason I ask you that, I remember you had a job up there at St. Helens about 1937 or so, didn't you? A. St. Helens? No.

Q. Well, anyway, do you know whether the Washington specifications state the tolerance which will be allowed when a person shifts his operation from one spot to another spot in a quarry?

A. I have no knowledge of the tolerance of the general specifications and the tolerance the contractor is allowed in producing that specification. For instance, in the three-quarter minus rock which used to be the oil rock they required from 45 to 65 percent of that material to pass a one-quarter inch screen.

Q. I guess I didn't make myself clear. Here is what I have in mind: Suppose someone begins an operation at one place and then moves to another place in an operation. A. Yes.

Q. Now do you know what the Washington state specifications say about the tolerance that is allowed when you shift your operation?

A. Tolerance in material, or do you mean that the cost will be allowed?

(Testimony of C. Jackson Eldon.)

Q. The cost will be allowed. [91]

A. Yes. Yes. I remember that too.

Q. Well, what does that say?

A. Well, they have a scale down there. I don't remember the exact figures but it seems to me it runs from around 750 to 1250; maybe more than that. That is, that the contractor is allowed the cost of moving his plant from one setup to another setup.

Q. That is it.

A. To get material that will meet the specification.

Q. That is what I have in mind. And your recollection is it is from 750 to 1200; is that correct?

A. No. I said they had a scale, and, if I remember right—understand, I am trusting to my memory now.

Q. Yes; sure.

A. The minimum or the smallest was around 750 and that the second one was around 1250, and it went on up. I don't remember just exactly what those costs were allowed, or what the provision was.

Q. Now how much must they move the plant before they will pay that?

Mr. Lichty: We object, your Honor, on the ground that the Washington specifications for material are the best evidence, and let's don't speculate on what they contain, if they want to get them in evidence.

The Court: He is testing Mr. Eldon's qualifications.

(Testimony of C. Jackson Eldon.)

Mr. Lichty: Well, if he is testing his qualifications—

Mr. Langley: No, I am not.

Mr. Lichty: —he has admitted them to me. He is trying to get [92] in evidence indirectly on the Washington specifications.

Mr. Langley: No, I am not.

The Court: He is testing his qualifications, nevertheless. It is cross-examination.

Mr. Langley: Q. How far will they tolerate a move before they will pay that?

A. I don't remember just how far it is. I believe they have a provision that if it is moved—in fact, I won't say just how many feet; I don't remember that in the specifications; but I know that there is a limit of a minimum distance to move the plant.

Mr. Langley: That is all.

Mr. Lichty: No further questions. Thank you, Mr. Eldon.

(Witness excused.)

Mr. Lichty: The plaintiff rests, your Honor.

Mr. Langley: Your Honor, at this time I would like to move for a directed verdict in favor of the defendant upon the ground that the plaintiff did not follow Article 15 of the contract involved in this action.

The Court: I am going to reserve decision until I hear all of the evidence.

DEFENDANT'S EVIDENCE

B. J. STEELE

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified [93] as follows:

Direct Examination

By Mr. Langley:

Q. Your name, please?

A. B. J. Steele.

Q. And your occupation?

A. My occupation is highway engineer.

Q. By whom are you employed?

A. I am employed by District 2 of the U. S. Public Roads Administration.

Q. And where do they have their office, please?

A. San Francisco.

Q. And what is your specialized work?

A. District Materials Engineer.

Q. How long have you been employed by the Bureau of Public Roads?

A. Approximately twenty years.

Q. What experience have you had in making maps involving roadways?

A. Well, I have been a locating engineer in charge of highway surveys.

Mr. Langley: Will you hand the witness Defendant's Pre-Trial Exhibit 23. Q. Tell us, did you prepare that? A. I prepared this.

Q. What is it?

A. Well, it is a map of the quarry, of the site three-tenths, approximately three-tenths of a mile right of Station 1239. [94]

(Testimony of B. J. Steele.)

Mr. Langley: I offer it in evidence.

Mr. Lichty: May I see it, please?

Mr. Langley: Q. I will ask you just one further question. Did you make it to scale?

A. Yes, it is made to a scale of fifty feet to the inch.

The Court: Didn't you see it at pre-trial, Mr. Lichty?

Mr. Lichty: Yes. I just wanted to be sure that I had the same thing in mind. They put in a number of exhibits there.

The Court: Was that made for this trial?

Mr. Langley: Yes; by request.

Mr. Lichty: No objection.

(The map bearing the legend "Vicinity Map of Quarry Site, California Forest Highway Project 77-D4,E4", etc., with photographs pasted thereto, so offered and received, having been previously marked "Plaintiff's Pre-Trial Exhibit 23" was further marked Defendant's Exhibit 23.)

Mr. Langley: Q. Would you show it to the witness, please. I wish you would just explain there so a person can understand what that map shows or means.

A. Starting at the right, at the highway on the left-hand side of this map—

Mr. Lichty: May I come forward and examine this, your Honor?

The Court: One of you get on one side and the

(Testimony of B. J. Steele.)

other on the other and I will get in a neutral corner. [95]

A. Well, starting at the highway which is constructed with material from the site in question—

Mr. Langley: Q. This is from McCloud, is it?

A. This is to McCloud and this is south (indicating).

Q. Tell us which way this road goes.

A. This road goes east to Burney Falls, or northeast, you might say, to Burney Falls, or southeast to McCloud.

Mr. Lichty: Southeast or southwest?

A. Southwest. That is right.

Mr. Langley: Q. Now what is this? Tell us what this is.

A. Well, this is the place of an old quarry that is adjacent to and in sight of the highway that was used for some work previously.

Q. And what is this along here?

A. This is Bear Creek.

Q. Now show us where three-tenths of a mile right of Station 1239 is.

A. Well, by measuring along the center line of the road it is at this point (indicating), approximately equidistant from the two faces.

Q. This is the face the operation was begun?

A. That is right.

Q. And this is the second face, what we call the second face, is it? A. That is correct.

Q. And three-tenths of a mile is—

A. It falls right here (indicating) by measuring along the center [96] line of the old road, and it falls here (indicating) by airline.

(Testimony of B. J. Steele.)

Q. Now then, by the road how far does your calculation on this map show what we call the second face from the first face?

A. Well, on one edge, on the near edge in each case it is 285 feet straight across, or it is 320 feet by the road between the two faces.

Q. Now then, were you the man responsible for this specification, this source, section 2.2?

A. I recommended that this be one of the sites designated as available.

Q. Now can you tell us what you had in mind when you used the word "approximately"?

A. Well, I had in mind this—yes. I would say the word speaks for itself, "Approximately".

Q. Well, what is the contour? What is up there around it?

A. Well, the greatest exposure of rock was this old face here which had been previously opened and operated by the county, and it didn't cover as large an area as this now does. That had been out in here (indicating) but to the left of that as you face it there was considerable outcropping of rock, and there still is, on the left side of this quarry of what appears to be as durable rock as was ever exposed before in the original face, but at various points up and down the canyon there is flood rock on the surface in the soil.

Q. Now let me ask you this question: If you had intended to have [97] designated that source what would you have said?

(Testimony of B. J. Steele.)

A. We would have said no doubt the existing quarry face so far to the right of this station.

The Court: What was right of the station? Where was the station?

A. The station was here (indicating).

The Court: Then why do you say to the right?

A. Well, the station goes in a—it goes from north to south is why we say “right”.

The Court: Yes.

Mr. Langley: Q. Did you ever run any tests back in there?

A. We had two samples taken out of this old face and laboratory tests made on them. I first saw the site in September, 1936. I was told that it was up there by a resident engineer which we had on other work in the previous contract on this route. I had previous tests on this face down here near the road, but as that would make a landscape scar we didn't want to use that, but he told me of this other place approximately three-tenths of a mile to the right and we together examined it and later we had two samples taken from it.

Q. This is in a national park, is it?

A. Well, it is a national forest highway and the preservation of the landscape adjacent to the road is of importance.

Q. Well now, what relation does that so-called restrictive clause in the specification have with reference to landscape? [98]

A. Well, that is the reason for that clause being in there, that no other source shall be used with-

(Testimony of B. J. Steele.)

out the written approval of the engineer, is to prevent the use of, say, a face like this which would be in sight of the road or at some other point along the road. There might be suitable rock at many places which would be objectionable from the landscape standpoint. With that clause in there the engineer has control over opening sources.

Q. Were those photographs taken while you were there?

A. These photographs were taken under my direction at the time I made this map.

Mr. Langley: I guess that is all of the questions I have on the map.

Q. Mr. Steele, in this specification there are two sources designated and I think that Mr. Johnson has testified that the fact that two sources were stated there was of material effect in his bid, in the way he figured the bid. Now then, what is your side of it? Why did you put the two spots in there?

A. Well, we had this gravel pit five-tenths—

The Court: The map doesn't show the gravel pit, does it?

Mr. Langley: No. I will put that one in. The gravel pit is way down at the other end?

The Court: There are two sources you are talking about. One is the gravel pit?

Mr. Langley: When I speak about the two sources I am speaking of two sources in the contract. This is at 1239, which is the [99] quarry, and the other is at 870. That is the gravel pit.

(Testimony of B. J. Steele.)

The Witness: We had considerable knowledge of this gravel pit five-tenths of a mile right of Station 870 because it had been used in a previous contract on this road. We did, however, make the usual additional tests on the material. Then it was desirable to find a source nearer the south end of the job and this source designated right of Station 1239, approximately three-tenths of a mile right, seemed a logical source to designate.

Q. Well, the point I am getting at is, did it make any difference to you whether the contractor—

A. Oh, not at all. The first thought about the matter was to specify only this gravel pit which had been used on the previous contract, and of course many contractors—some contractors might have preferred to crush the gravel and haul it a longer distance rather than install the heavy equipment for crushing rock. On the other hand, by specifying this source it gave an opportunity to contractors which were equipped to handle rock to use it economically. There was no investigation of quantities available other than just the examination of the general outcrops along the side of the canyon at this 1239 source made.

Q. There is nothing in the specification, is there, that says that he has got to use both sources?

A. Certainly not. There is nothing in the specification that says that he must use both sources, and we had no desire one way or the other in the matter, whether he used one source or two. [100]

Q. In other words, some man's equipment might fit just one source? Is that what you had in mind?

(Testimony of B. J. Steele.)

A. Well, yes. The lighter portable plants might be used for crushing only the gravel and then hauling longer distances.

Q. Is this word in the specifications "available", is that a word of your choosing?

A. That word means "designate".

Q. That is what you intended it to mean?

A. Yes.

The Court: Means what?

A. Means a designated source.

Mr. Langley: Q. Now, Mr. Steele, in the questions that I have asked you I have tried to cover two points. One of them is your position about this provision not being a warranty, and the other as to what we call the second face, is the position of it, that it is not a change of site. You see what I mean? I tried to cover those two points. Now one other contention that you have is that this quarry did not fail; it was a satisfactory quarry; is that correct?

A. That is our contention.

Q. Now in the regular course of business were production records kept by the Government?

A. They were kept.

Q. Do you have those production records with you? A. Yes, I have. [101]

Q. And did you make a summary of those production records? A. I did.

Q. Do you have that summary here?

A. Yes, sir. I have it in my pocket.

(Testimony of B. J. Steele.)

Q. Well now, I think that you had better explain how you took that summary off of the books, as briefly as you can.

A. Well, any information that I have summarized on here was taken either from the diary, which is on file with the Court, or from the daily production record books, of which the transcribed reports are on file with the Court, or from the plant inspector's daily record of the operations of the plant.

Q. Now what does your summary show?

Mr. Lichty: We first want to know if all of those things are in evidence here.

Mr. Langley: No, I don't think so. That is correct.

Q. Now what books are there that you brought up with you yesterday from San Francisco that had not been here before?

A. Well, I would say this, Mr. Langley: The material, so far as production records from day to day are concerned, are on those reports signed by Wood, which were taken out of those books, although I actually obtained the same material from the books. We have turned over to the Court the transcribed sheets.

Q. That is Defendant's Exhibit No. 21, I think. Look at 21 there, please, and see if that is what you are talking about. It is a thick book, Ross. Hand that to the witness. That is Exhibit 21. [102] Is that what you are talking about?

(Testimony of B. J. Steele.)

A. Yes, sir, this is what I am talking about, and the same—

Q. Just a minute. Do you know the handwriting of Mr. Wood?

A. Yes, I do, from long years of experience with it.

Q. Can you tell by looking at that whether that is his handwriting or not?

A. Do you wish me to examine all of these signatures?

Mr. Langley: No.

Mr. Lichty: No, no, no.

A. Well, I would say that this is Mr. Wood's handwriting.

Mr. Langley: Q. That was kept in the regular course of business?

A. And it was kept in the regular course of business.

Mr. Langley: Well, we will offer it in evidence.

Mr. Lichty: What is the purpose of keeping that record?

A. Well, that is to show the District Office each day's production and this is sent in—these reports that I have in my hand are mailed in by the Resident Engineer each day so that the District Office is advised day by day of the production of material from sources being used. The Resident Engineer keeps on the project a book which all of this material is entered in and from which he makes up his estimate.

Mr. Lichty: That is a copy from his book?

(Testimony of B. J. Steele.)

A. That is a copy from his book.

Mr. Lichty: His book is his original record?

A. That is correct. [103]

Mr. Lichty: We object to the introduction of those on the ground that it is not an original record. It is merely sent in as his interpretation of his original record.

Mr. Langley: Q. You mean this you have in your hand is a copy?

A. Well, it is made out daily by the Resident Engineer.

Q. On the job? A. On the job.

Q. In the regular course of business?

A. In the regular course of business, and it is made as the rock is weighed, load by load, and it is recorded in a book and at the end of the day he adds that up and makes out this daily report to send to the office, so this is a summary of the day's work.

Mr. Lichty: It is his interpretation of what his book reflects?

A. I would not say an interpretation. It is a record made—

Mr. Lichty: He makes it up from some other record? He does not keep that in his mind when he sets it down on paper, does he?

A. No. He adds up in the book the total tonnage for the day and puts it on this record.

Mr. Lichty: Well, we would like to have that report.

(Testimony of B. J. Steele.)

Mr. Langley: Well, I don't like to insist on this rule but you know what the rule is. You have got to reserve your objection at the pre-trial if you are going to make that, to give us a chance to meet that, so we could have brought the book up.

Mr. Lichty: I don't object to this being what it is but I say it is not proper to introduce it in evidence. I am not saying it [104] is not Mr. Wood's writing. I still say I don't think it proves what it does show.

The Court: I admit it subject to the objection. I also admit this gentleman's summary, subject to objection.

(The Original Daily Report for Crushed Rock Surfacing kept by Joseph E. Wood, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 21, was further marked "and trial"; and the "Summary of Production Record of Crushed Rock and Crushed Gravel Materials"; so offered and received, was marked Defendant's Exhibit 291½.)

Mr. Langley: All right. Then hurry and go over that summary as quickly as you can.

A. "Project Records kept by Resident Engineer Wood and his assistants show that all crushed rock and crushed gravel materials required for completion of the project were obtained by the contractor from the sources designated in Special Provisions of the contract. These records show the fol-

(Testimony of B. J. Steele.)

lowing kinds and quantities of materials were obtained from these sources:

“(Rock) Approximately 0.3 mile right of Station 1239, Crusher-run top course”—

Q. Just a minute. You are talking about what we call the first face now?

A. I am talking about the entire quarry. I can give you additional [105] detail on that later.

Q. All right.

A. From the source approximately three-tenths of a mile right of Station 1239, 24,359, which is the crusher-run top course, was produced. From the gravel pit approximately five-tenths of a mile right of Station 870 the following materials were produced: Crusher-run top course 20,815 tons. Supplemental crushed stone in stockpile 489 tons; cover material, previously referred to here as oil rock, 3,586 tons; making a total from this second source of 24,890 tons.

Now the quantities from the two sources added together make a total of 49,249 tons of crushed materials required to complete the contract. Of this total 49,249 tons, 24,359 were obtained from the source approximately three-tenths of a mile right of Station 1239 and 24,890 tons from the source approximately five-tenths of a mile right of Station 870.

Q. Now you understand, of course, that their contention is that there were two different sources up there at 1239, don't you?

(Testimony of B. J. Steele.)

A. Well, yes, I do.

Q. Now how much does your summary show of crusher-run was produced at what we call face number one?

A. The records show, 1, that a total of 24,359 tons were produced from this source; 2, that 15,890 tons were produced from face number one before any rock was taken from face number two; 3, after starting to take rock from face number two on September 8th, 1937, [106] rock was obtained alternately from face number one and face number two; 4, from production record of shifts during which rock was obtained from face number two not more than 4,262 tons could have been produced from face number two; 5, of the total 24,359 tons produced at least 20,097 tons came from face number one and not more than 4,262 tons came from face number two.

Q. We don't make any contention that any cover material was ever produced at 1239, do we?

A. No material was produced to our knowledge—no cover material.

Q. I mean accepted. No cover material was ever accepted from the operation at 1239; is that correct?

A. It was never accepted or rejected.

Q. And what is your contention about it being produced there?

A. Well, shall I tell you the first time I saw the quarry after the operation started?

(Testimony of B. J. Steele.)

Q. Yes. That is the conversation which the superintendent tells about; is that correct?

A. Yes.

Q. All right. Let's have your version of that.

A. All right. On July 17th, 1937, I visited the project and at the Resident Engineer's request—

Q. Well, before you get ahead, how do you happen to visit the project?

A. Our District Construction Engineer had had a telephone call either from Mr. Johnson or Mr. Wood and he happened to know that [107] I was going up into that vicinity on another project within a day or so and he asked me if I would not incidentally drop up and inspect this quarry site.

Q. All right. Now tell us the conversation that you had there.

A. Well, Mr. Wood and I crawled in the coyote holes with flashlights and we found alternate hard and soft material. We re-examined the original face that was opened above and it appeared all right as before. The conclusion was that while we had encountered some soft material in these coyote holes, that it didn't follow that there wasn't a substantial quantity of suitable rock here. After discussing the matter with Mr. Wood I advised him that if the contractor elected to proceed and load and shoot this coyote hole, that it was rather obvious that he would evidently get down to soft material in the bottom of this quarry which would not be usable, or could be used only as for fine material in the crusher-run course. But it was my opinion at the

(Testimony of B. J. Steele.)

time that there was a large quantity of suitable rock that could be used for cover aggregate, if the cover aggregate was made prior to getting down into the soft rock. We later discussed the matter with the contractor's superintendent and that is all that we had to say about it.

Q. Well, what did you tell the contractor's superintendent—your best recollection?

A. Well, I either told him or Mr. Wood told him, after advising with me, that we thought that he could obtain a substantial quantity [108] of suitable material out of the quarry, but that certainly these soft pockets which showed up in the bottom could not be used for any purpose other than the supplying of deficiency of fine material in the harder rock, and that shooting the holes with the soft material in the bottom would no doubt intermix with the harder rock above to some extent but not necessarily for the top fifteen or twenty feet.

Q. Is that the only conversation that you ever had with Mr. Johnson or any of his employees about this quarry?

A. I didn't have a conversation with Mr. Johnson at that time. It is my recollection the superintendent was on the project.

Q. Yes, but I mean after that did you ever have a conversation with Johnson? A. Yes.

Q. Or any of his employees?

A. Well, not with the contractor's employees. I did have a subsequent conversation with the Resident Engineer about the quarry.

(Testimony of B. J. Steele.)

Q. Well, we had better have the whole story. Let's have what you said.

Mr. Lichty: Well, I object to that now on the same ground. You have been hollering about hearsay.

Mr. Langley: O.K. That is all right. I don't care about having it.

Q. Now I think, Mr. Steele, that there was some testimony by Mr. Johnson that you talked to him. Do you remember talking to him? [109]

A. Well, I believe that Mr. Johnson's memory fails him about the conference in July; that he was not on the project at the time I was. I did see Mr. Johnson on July 31st on the project—on August 31st, rather.

Mr. Langley: That is all the questions we have.

Mr. Lichty: At this time, your Honor, before cross-examination, I wish to make a motion for the record, and that is, I move to strike all the testimony of this witness relative to anything reflected in the reports which Mr. Wood made to the District Office, in which he has used summarizations.

The Court: The reports and the testimony based thereon are admitted, subject to the objection.

Cross Examination

By Mr. Lichty:

Q. Mr. Steele, in your measurements which you very kindly made on this map for us, can you tell me why in measuring the distance from the station on the highway to the face of that quarry you didn't measure along the most obvious route to the face of

(Testimony of B. J. Steele.)

that quarry. In other words, there is a road branching off, marked Station 11 plus 70.5; there is a road branching off to the north there up leading to the face, what you call Face No. 1 of the Johnson quarry. Now can you tell me why in making your measurements of three-tenths of a mile to the right of that road you didn't follow the road directly into the quarry rather than following down the highway that the quarry is not located on? [110]

A. Actually I did, and that is on here to scale, although not shown in figures. It is my idea it was obvious that you could visualize swinging this line, this mark here, you could swing it over here, you could swing it over here (indicating).

Q. That would be directly at the face of the quarry?

A. That would be very close to the existing face.

Q. Don't you think the contractor in examining the site of that work and looking at the quarry would measure three-tenths of a mile down rather than go down the road which the quarry was not facing?

A. I think measuring the sites with his speedometer, if any, if he got anywhere in this vicinity he would consider the face of the quarry. I think it is very logical he would consider this open face as the site of the quarry.

Q. That is right. And he would not go down the road on which the face was not located to measure the distance to the quarry, would he?

(Testimony of B. J. Steele.)

A. I don't think he would. I think he would measure it here and would get the same distance.

Q. Now what you call face number two of the quarry, did you at any time when you were up there examining this quarry site, did you ever go there and locate any rock there?

A. I can't say that I did. I can say that I walked along the floor of this canyon both below and above this site, but to say that I specifically located rock there I cannot testify I did. [111]

Q. And in your opinion when you viewed what you call face number one of the Johnson quarry you thought that there was sufficient rock in that immediate area where the face was opened for the contractor's purposes, did you not?

A. At the time that we examined that face and at the time we made subsequent tests I didn't know the quantities of material involved. I simply determined the quality of the material in places exposed in this face, and I checked it against previous tests of material down here adjacent to the road of the same type and it happened to check very close and satisfied us as to the quality of it.

Q. And you anticipated that the contractor in drilling, blasting and using the quarry would use what you call face one of the Johnson quarry?

A. I would say that it would be a very logical place to start in.

Q. And that is what you anticipated when you took samples off of that face?

(Testimony of B. J. Steele.)

A. Well, I felt there was every reason to believe, with the exposure down here and the exposure here and the float rock along at approximately the same elevation, that you might hit this rock anywhere you would go into the hill all the way from the highway up here and above.

Q. Now when you went up there and went into the coyote hole and found what you say were soft stratas intermingled with hard stratas of rock——

A. I said pockets. [112]

Q. Yes. They were just pockets; there were no stratas? A. No definite strata.

Q. No definite strata? A. Just pockets.

Q. And you didn't find as you got in farther it got softer?

A. My recollection of the matter is that it was hard and soft, and then it would get harder and somewhat softer. It was quite variable at the elevation. You see, the previous face, or the original old face used by the county was at a considerably higher elevation and this coyote hole was put in down at the——

Q. Creek bed level?

A. Well, approximately so; the level of this flat, at any rate, which was logical enough. So you were in at an elevation not previously exposed when you put the coyote hole in. The coyote hole was an exploration of an elevation not previously explored.

Q. In your opinion was it improper to coyote

(Testimony of B. J. Steele.)

that quarry and shoot it? Would there have been any other more satisfactory method?

A. I think it was a very logical method to adopt for boring.

Q. The only other way is down-holes, isn't it?

A. That is right.

Q. And then shoot down-holes when you have an exposed face, just in a flat surface?

A. Pardon?

Q. Isn't it? A. Pardon me? [113]

Q. Your down-hole shooting is not ordinarily undertaken where you have a bluff to work on, is it?

A. Well, it is quite often undertaken, yes.

Q. But not ordinarily?

A. Well, I would say I have seen it employed a great deal—a great deal more than coyote holes, in the territory in which I worked in California and Arizona. Down-hole drilling is very common.

Q. In quarry faces?

A. In quarry faces. May I add here——

Q. Add anything you wish.

A. I would say from the exposure of rock at the time he went to the quarry to drill his hole a coyote hole was the logical idea. Now as to whether he should have moved that hole up to a higher elevation after he found soft rock below the rock previously exposed is another question. That was a matter for his judgment, of course.

Q. You didn't suggest it to him?

(Testimony of B. J. Steele.)

A. I didn't suggest it to him. I simply called attention to the fact he would shoot loose unsuitable material if he blasted the hole as drilled.

Q. Did you suggest to him at the time he had better explore for other rock someplace else?

A. No, I did not.

Q. Now you say it was desirable to locate some rock near the south [114] end of the job. Why was that desirable?

A. To make a shorter haul.

Q. That is right. And in making a shorter haul to save the cost of the project?

A. That is right. (Witness nods his head.)

Q. The answer is "Yes?"

A. Yes.

Q. You say your first thought was to use only the gravel from the proved source that was near Station 870? That had been proved? It had been used on the road previously. But the reason for your designating another source was in order to cut down the overhaul, wasn't it?

A. That is correct, which the source did accomplish.

Mr. Lichty: That is all.

Redirect Examination

By Mr. Langley:

Q. On that question about the purpose in designating two sources being to cut down the cost of operation, you mean by that, do you not, if the contractor proposes or determines to use two sites? Is that correct?

A. If he proposes or determines to use two sites.

(Testimony of B. J. Steele.)

Q. But you also had another reason, and that was to give him his choice of using one or the other absolutely, didn't you? A. How is that again?

Q. But you had another reason for designating two sources, so that [115] the contractor could, if he desired, use one source exclusively?

A. One or both, yes.

Q. Sure; to give him more——

A. To the extent that he found material at either source.

Q. In other words, your sole purpose in making two designations was not that the contractor must use two? A. Oh, absolutely not.

Q. One of the Government's points, I think, is, Mr. Steele, that the second face is within approximately three-tenths of a mile right of 1239. Now in that connection, in your experience what distance is a tolerance between sites of operation, beyond which compensation will be paid?

A. Well, I have seen a number of operations where a contractor would work from one thousand to two thousand feet along the face of a bluff, selecting rock at one place and skipping a section where the rock was not good. We have many cases——

Q. What is the general practice of tolerance?

A. Well, there is a rather general practice in earth work, for instance, on a road construction, to allow a free haul of five hundred or a thousand feet. Some states designate how far——some states provide a definite method of compensation in case the desig-

(Testimony of B. J. Steele.)

nated floor is exhausted, and then they further designate that a contractor must move a certain distance away from the original face before it is considered a new source.

Q. Well, how far is that? [116]

A. Well, Washington state has a——

Mr. Lichty: We object to that, your Honor, as immaterial; and on the further ground that the best evidence of it would be the specifications of the State of Washington.

The Court: He may testify subject to the objection.

A. Washington state has a clause in their specification that they will not pay for crusher moves of less than one thousand feet.

Mr. Langley: Q. Do you consider that reasonable? A. I would consider that reasonable.

Q. Did you have that in mind when you specified this approximately three-tenths of a mile?

A. Yes. In specifying approximately, why, that was the general area. The point was that we would have gone into this source which I pointed out down adjacent to the road for shorter haul, except for the landscape scar. The reason for moving up the canyon was to get the cover of the trees. So that, anywhere he could produce rock without the scar showing at the highway would have been satisfactory to us—the distance of a thousand feet, you might say, either way.

Mr. Langley: That is all. Thank you.

(Witness excused.)

Mr. Langley: Mr. Brown, will you take the stand?

Mr. Lichty: Your Honor, could I have about five minutes before he starts? [117]

The Court: Yes.

Mr. Langley: I might say to your Honor, this is my last witness, so we will finish.

(Short recess.)

LEVANT BROWN

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Langley:

Q. Your name, please?

A. My name is Levant Brown.

Q. And your occupation?

A. I am a senior highway engineer in the Public Roads Administration at San Francisco.

Q. What was your employment in 1937 and possibly '38?

A. I was assigned as engineer in charge of the forest and park road division of the District, under the District Engineer.

The Court: I think I know the answer but I want the record to show here, so I bring it up before I forget it. Who owned these materials, and so on? You see what I mean? Do you know what I mean? The gentleman who just testified

(Testimony of Levant Brown.)

said he could go any place within a thousand feet one way or another and get this same rock, but who owns the rock?

Mr. Langley: Can you answer that?

A. The location to the right of 1239 was on National Forest land. [118] It was in Government ownership.

The Court: Well, that still is not the whole story. If I went out there and took some of it, or picked some wildflowers I would be in trouble within a certain number of feet from the road. There must be some provisions in the statute that in the construction of a road through a national forest nobody may use material from either side a certain distance from the highway. Is that it?

A. That is true as far as rights of way are concerned. When a road project is programmed by the Secretary through national forest land it includes the right of way. When the material such as a quarry is to be obtained a special use permit is required from the District Forester.

The Court: Who obtains that? The Bureau of Public Roads?

A. Well, the Public Roads does. We have adopted the general policy of obtaining the quarries in order that there be free competition among the contractors; that there will be no one contractor who can go out and get an option on a certain quarry on private land and prevent other contractors from bidding because he owns the option to the materials.

(Testimony of Levant Brown.)

The Court: So there must be a use permit in existence some place which permitted the Public Roads Bureau to advertise that certain quarries were open to use by the successful contractor?

A. The quarry at 1239, your Honor, was such a quarry. The one at the gravel pit at 870, or to the right of 870, was on private land. [119] We had an agreement, through the State of California, to pay royalty on the material taken from that gravel pit.

The Court: Thank you, sir.

Mr. Langley: Q. Is it a fact that Joseph E. Wood was Resident Engineer on this job?

A. Joseph E. Wood has been a Public Roads employee for many years and was Resident Engineer on this project.

Q. To the best of your knowledge where is Joseph E. Wood now?

A. In the Southwest Pacific some place.

Q. And when he left your service where did he go?

A. When he left our service, which was approximately January of 1941, late in '40 or early in '41, he went to a draft training camp.

Q. Well, the point I am getting at, when he left your service he went into the army; is that correct?

A. He went into the army. He was a captain in the Engineer Reserve Corps.

Q. And when was that, do you say?

A. Late in 1940 or early in 1941.

(Testimony of Levant Brown.)

Q. I see. And have you been able to communicate with him since he has been in the army?

A. Yes. We communicated with him about a year ago, I would say, and we first communicated with his wife to get his address. She gave it to us and we wrote him direct, asking him when he would likely return, or if there was any possibility of his returning [120] within a reasonable time. We got a reply to the effect that he expected he would be returned within six months after the duration.

Q. And have you made any effort to secure his attendance here through the War Department?

A. No. We haven't thought that was a possibility. Joe Wood is now a Major of Engineers and we felt that his services in his present capacity were probably much more important to the war effort than his attendance on this case. We felt that if we should ask the War Department for his return it would meet with an instant refusal.

Q. And have you attempted to make arrangements to take his deposition?

A. No, we did not do that for the same reason, that we thought it was useless to demand his attendance at this case.

Q. Do you know Joe Wood's handwriting when you see it?

A. Oh, yes.

Mr. Langley: Would you show the witness Defendant's Pre-Trial Exhibit 20?

Mr. Lichty: We admit that is his diary, if that is what you want.

Mr. Langley: All right.

(Testimony of Levant Brown.)

Q. Was that kept in the regular course of business?

A. All of Public Roads' resident engineers are under current instructions to keep a diary of important events that occur on the project every day. If they do not do so they are properly—well, we say a few harsh words to them. [121]

Q. Was that Defendant's Exhibit 20 handed in to the Bureau by Joseph Wood at the completion of this job?

A. This was returned to San Francisco along with the balance of the project papers and has been under my direction since that period of time.

Q. And that is his handwriting?

A. This is not handwriting as such. It is printing, sir.

The Court: Well, Mr. Lichty no doubt will stipulate that is Wood's diary.

Mr. Lichty: I stipulate it was Mr. Wood's diary kept on the project.

Mr. Langley: Well, I move its admission in evidence.

Mr. Lichty: We object, your Honor, in that it contains much self-serving material; that it is not a record of happenings and events but it is also his interpretation of them, and that there is no chance for cross-examination.

Mr. Langley: Well now, for the record, we—

The Court: You don't need to say anything for the record. It is admitted. The objection is overruled. The diary will be admitted.

(Testimony of Levant Brown.)

(The Original Diary of Daily Events, kept by Joseph E. Wood, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 20, was further marked "and trial.")

Mr. Langley: Mr. Brown, I think the final contention so far as our case is concerned is that Mr. Johnson did not begin operations within what the defendant claims to be a reasonable time after he received notice from the Government. Is that correct? A. That is correct.

Q. Now do you know when the Bureau of Public Roads notified Mr. Johnson that he was the low bidder?

A. The bids were opened on the afternoon of May 18th at two o'clock, 1937. Mr. Johnson was the low bidder and at his request we sent him a collect telegram informing him that he was the low bidder, and the name and bid price of the second bidder.

Q. Then when did you communicate with him next about it?

A. The next communication, according to my recollection, was on the 7th of June. We received a telegram from Washington stating that the Secretary had accepted Mr. Johnson's proposal. We sent Mr. Johnson a night wire, stating that his bid had been accepted and that his time would start on the 10th of June. According to previous testimony, Mr. Johnson stated that that wire was received at the

(Testimony of Levant Brown.)

Imperial Hotel on the 8th of June, and he received it the 9th of June, which in my opinion is correct.

Q. Now Mr. Brown, will you just go ahead and tell us what your contention is about this.

A. I wish to state that as administrative engineer in charge of the progress of this contract, as well as the other contracts that the District had under way at that time, we were very much [123] concerned over Mr. Johnson's apparent lack of appreciation of the necessity of early action on the project. The specifications called for a time limit of one hundred twenty days. That expired October 7th, 1937. There was a prohibition in the specifications which provided the contractor should not work on Sundays and holidays—should do no productive work. I might state that that provision had been inserted in all of our contracts because contractors were inclined to work seven days a week. It kept our engineering party on the job seven days a week and gave them no opportunity for rest or recreation. In addition to that—the fact, rather, that he could not work on Sundays and holidays approximately twenty days off of the contract time. His time was four months, four calendar months, one hundred twenty days, and there would be about twenty days in there, roughly, counting Sundays and holidays, on which the contractor could not work—was not supposed to work. He had approximately 49,000 tons of material to get out and place on the road. He also had to erect his plant, develop and shoot his quarry. A reasonable time for that would be

(Testimony of Levant Brown.)

thirty days, ordinary time. That cut his time down, his effective time for operations, to practically seventy days, which required an output, daily output, of 700 tons a day.

Although Mr. Johnson was advised on the 18th of May that he was the low bidder on the contract, and was again advised on the 8th or 9th of June that he had been awarded the contract, there was no apparent action on his part until he visited the project [124] with his superintendent and, according to the testimony here today, with Mr. Thomas, the contractor for his trucks, until the 18th, I think it was according to the diary, the 18th of June. They stayed on the project the one day. They left the project—testified they came back to Portland. The superintendent returned to the project on the 28th of June. He testified I think that he came back in about a week. Well, it was actually ten days. He had lost, or Mr. Johnson had lost nineteen days there from the 10th of June until the 28th of June, inclusive, on which no work was done on the project.

When the superintendent arrived he brought an air compressor with him and started properly to develop the quarry. I think the record shows that they started the coyote hole on the 5th of July. He completed the coyote hole, again according to the record, Mr. Woods' diary, about the 22nd of July, at which time there was no powder on the job. I guess maybe he completed the coyote hole a couple

(Testimony of Levant Brown.)

of days sooner, because there was no powder on the job when it was completed. They shot the coyote hole—they shot the quarry on the 23rd of July. The rock crushers had arrived the previous day, the 22nd. He didn't produce any rock until the 9th of the next month, which was sixty days from the time that his contract time started. In other words, fifty percent of his time had gone by before he performed any productive operations.

The Government engineers were very much concerned with [125] regard to Mr. Johnson's apparent lack of appreciation of the time situation. We could not appreciate why it was. We did hand him several communications. We wrote to him on the 8th of July. I have a copy of that letter here, if the defense attorney wishes to offer it as evidence in this case, in which we wrote Mr. Johnson:

“Your attention is called to the fact that twenty percent of the contract time of your contract with California Forest Highway Project 77-D4,E4, Mt. Shasta-Mt. Lassen has elapsed and little or no work has been performed. It will be necessary for you to take immediate steps towards setting up the crushing plant and to start construction operations without delay. Please advise me a once what steps you intend to take.” Signed, “Yours very truly, C. H. Sweatser, District Engineer, by Charles C. Morris, Senior Highway Engineer.”

The Supervising Engineer, Mr. Potter, was on the job about the 18th or 19th of July and he saw the

(Testimony of Levant Brown.)

superintendent, I think, and again spoke to him about the necessity of speeding up operations.

On the 24th of August we wrote to Mr. Johnson again:

“In view of the very unsatisfactory progress of your contract for construction, California Forest Highway Project 77-D4,E4, it is requested you arrange to come to San Francisco as soon as possible. This meeting is requested in order that we may discuss your plan of operation and determine whether or not [126] the contract shall be allowed to proceed.”

Signed, “Yours very truly, C. H. Sweatser, District Engineer.”

Apparently Mr. Johnson either had some reason for not placing his——

Mr. Langley: Maybe you had just better say what you know and not your conclusion. Let's stay with that.

The Witness: Well, to proceed with the narration of the time between August 9th and September 18th, I think the record indicates that twenty-four thousand odd tons of material was produced at the site three-tenths of a mile right of Station 1239, at which time the material which was required for the easterly half of the contract had been produced except the cover material. There is a notation in Mr. Wood's diary to the effect that on the 18th of September a shaft in the roll's crusher broke and rather than await the completion of repairs the contractor decided to move to the gravel pit at Station 870.

(Testimony of Levant Brown.)

According to Mr. Wood, he discussed it with him and he had his approval for the move, although he states that there was still apparently plenty of hard rock in the quarry available for cover material. It took him about nine days to move his plant and set up at Station 870, and he started producing rock there about the 28th of September and completed his crusher-run material on—I can't recall that date, but he apparently had no difficulty at that plant. After completing his crusher-run material a period of about a week or [127] so in which he crushed his cover material, the operations for the season of 1938 were shut down on November 4th or 5th, at which time Mr. Johnson had completed all his crushed material and had spread most of it on the road, except for the cover material.

Q. You mean 1937?

A. 1937. Did I say '38? In June of '38 Mr. Wood returned to the project about the 10th or 12th of June and informed the contractor by a letter that his time would start on the 16th of June; that is the re-open contract time; and Mr. Johnson came to the project on the 18th and actually re-opened work on the 20th. Between the 20th of June and the 15th of July he was scarifying and reshaping and repriming the work which he had done the previous fall and which work would not have been necessary to do over again had he been able to complete the previous fall. From the 15th of July at noon until the night of August 1st, or August 2nd, he spent in putting on the armor coat and the

(Testimony of Levant Brown.)

project was accepted as completed on the night of August 2nd. There is nineteen days it took the contractor to complete the armor material after he had reshaped, completed the reshaping of the road which had been damaged by standing over the winter.

It is the Government's contention that had not Mr. Johnson delayed getting started at the beginning of his contracting time, had he had his crushing plant on the project installed after he shot the quarry,—if there had not been that delay of some two weeks he would have gained thirty days on the 1937 season. [128] To put it the other way, he would not have lost thirty days. He completed his operations, his rock crushing operations for the crusher-run or top course on October 17th. If he had not delayed that thirty days and all operations had gone on just as they did, the actual time consumed, he would have completed his crushing operations the 17th of September. From the 17th of September plus this nineteen days which he required in 1938 season to put the armor coat on and complete his project, he would have completed within the contract time, which ended October 7th.

Q. In other words, as I understand it, what you are getting at is, in your opinion a reasonable time in which to set up his equipment was thirty days?

A. A reasonable time within which to set up his equipment was thirty days, especially in view of his advance information of three weeks that he was the low bidder on the job.

(Testimony of Levant Brown.)

Q. So you think by July 10th it was reasonable for him to be going by that date; is that correct?

A. Yes.

Q. And he produced on about August 9th; is that right? A. Yes.

Q. And that is about thirty days? A. Yes.

Q. Now then, according to your calculations, if he had gotten started, if he had produced on July 10th instead of August 9th, he would have finished in 1937; is that right. [129]

A. He would have finished in 1937.

Q. Now can you just explain that very quickly and briefly, how you arrive at that conclusion?

A. I have explained that. Is it clear to you, sir?

The Court: That is a hard question you are asking me. I think he covered it.

Mr. Langley: All right.

Mr. Lichty: He has covered it thoroughly.

Mr. Langley: All right.

Q. Now then, Mr. Johnson did some work in the season of 1937 that he re-did in 1938. You have heard his testimony about it. I don't think you are making any contention he didn't do that, are you?

A. No.

Q. Now what is your position about it?

A. The Government's position on that is that if he had completed in '37, as he should have according to his contract, that work in '38 would have not been required. The project would have been accepted from him in 1937, at the end of the season. There would have been no possible claim for any repair

(Testimony of Levant Brown.)

work, any reshaping work, any claim for liquidated damages or any additional oil lost by the Government.

Q. Had his work in 1937 ever been accepted?

A. No. The work in 1937 was never accepted.

Q. And concerning his payment and acceptance, what relationship does that have? [130]

A. What our practice and contract provides is to give the contractor a progress payment every thirty days. His final payment is not made until the contract is accepted and has been approved by the Chief of the Bureau.

Q. So your position then is, relative to the 1937 work that he did in 1938, you didn't accept anything in 1937?

A. No. No work was accepted in 1937.

Q. Yes. And you are not obliged to pay him under the contract, according to your interpretation, until he has completed the work? A. Yes.

Q. So then when he had to do what he did in 1937 over again in 1938, that was because not only of his delay but also under the contract you don't feel that you are responsible because it had not been accepted; is that correct?

A. No. There was no responsibility on the part of the Government for any non-acceptance of un-completed work.

Mr. Langley: That is all the questions I have.

(Testimony of Levant Brown.)

Cross Examination

By Mr. Lichty:

Q. Mr. Brown, when do you start his time running?

A. His time started on the 10th of June, 1937.

Q. How do you fix that?

A. That was set by the District Engineer after the award of contract.

Q. You say they received notice from Washington on June 7th. [131]

A. Yes, sir.

Q. That the contract had been awarded?

A. Yes, sir; that the contract—that Mr. Johnson's proposal had been accepted.

Q. Then you think that he ought to have been working on that job three days later, on June 10th?

A. No. No. The contract provides he shall start work within ten days after receiving notification of award. That would have had him start on the 20th of June. He actually——

Q. Why do you start his time on the 9th, then? Why did you say his time starts on the 9th of June?

A. His time started on the 10th of June, but he has to begin operations within ten days from that date. That is a provision in the specifications.

Q. Then his time does not start to run ten days after notice to proceed?

A. No. His time starts to run when his time is started.

Q. And immediately that his bid is accepted in

(Testimony of Levant Brown.)

Washington they notify him by telegram and his time starts to run; is that is?

A. Well, there was a three-day interval in there.

Q. And the contractor doesn't know until you give him that notification that his bid ever will be accepted?

A. Well, he had the advance information that he was the low bidder on that, on the job, and it is general information that when a man is a low bidder he is awarded the contract [132]

Q. Didn't you write him on June 3rd that, although he was the low bidder, not to make any preparations to do any work until he had been notified of the award?

A. That is a routine admonishment so that a contractor will not actually expend money.

Q. It is a protection for the Department in case they don't award it?

A. To protect, and the possibility of a non-award.

Q. That is right. And the contractor gets that letter, and yet in the Department's eyes he should be starting to do it notwithstanding that, only they don't want to pay for it. Is that the answer?

A. No. I wouldn't say that was the case.

Q. You wouldn't?

A. He has ten days in which to begin operations.

Q. But they start the time during that period of time that you know he is going to have to be assembling his equipment, any contractor that far away, and getting it down to the job and getting organiza-

(Testimony of Levant Brown.)

tion set up for it after you notify him that he is awarded the job?

A. After Mr. Johnson's experience or his equipment record, his plan of operation, he had his equipment in storage in this town here——

Q. He has to get a foreman, has to get men to work, and yet you are complaining that three days after Washington, D. C., accepted [133] that bid he wasn't working on the job?

A. No, I am not complaining that he wasn't working.

Q. No. You are just saying that he should be penalized for it?

A. The desire on the part of Government was to complete the project within the 1937 working season.

Q. That is right.

A. If we had been more severe and made the contract ninety days in order to insure completion it might have been different. What we were trying to do was to avoid just what occurred.

Q. All right. Now on June 28th, I believe that Superintendent Hildeburn arrived on the job with men and a compressor? Isn't that what the diary shows?

A. That is what the diary shows.

Q. The diary shows on June 29th he started to work on the quarry, doesn't it?

A. He started to work with two men on the quarry, one mechanic setting up the air compressor.

Q. Yes. On July 5th contractor brought in a small shovel and cleared the face of the quarry and

(Testimony of Levant Brown.)

started on coyote hole. That is what the diary shows.

A. And the superintendent confirmed that today.

Q. So in less than thirty days from the date the contract was accepted in Washington he was there and was operating?

A. He was there and beginning his preparatory operations.

Q. Preparatory operations. Drilling those coyote holes certainly [134] is not a preparatory operation, is it?

A. Yes. The only productive operation is the production of the actual rock, placing it on the road.

Q. That is right, but of course at least a third of the average contract is what you call preparatory operations, isn't it?

A. Well, there has to be a certain amount of preparatory operations.

Q. That is right.

A. There is no doubt about that.

Q. That is right.

A. The thing the Government engineers were concerned about was that fifty percent of the contract time had elapsed before any rock was actually crushed and hauled out.

Q. That is right. And then I think that the soft rock encountered in this coyoting and the necessity of stopping and getting a material engineer from San Francisco to do anything, would add to that delay in putting rock on the road.

(Testimony of Levant Brown.)

A. It is not my understanding there was any stoppage of work. It is not so indicated in Mr. Wood's diary.

Q. July 11th, Sunday, the diary says "Mailed note to Potter. Rock in quarry turned soft. Looked at other possible quarry sites, one at Bear Creek near Pondosa and at Dixon Flats." You don't think, while they were looking around for other quarry sites due to the fact that your own engineer says the rock in the quarry turned soft, that that would have anything to do with it, do you?

A. If you will read the entry the next day you will notice he says [135] the contractor was continuing with coyote hole.

Q. Certainly. Certainly. But all of that didn't indicate, and wouldn't indicate to you in the contractor's operation when he was encountering a situation like that in the quarry that had been turned over to him by the Government, that it ought to cause any concern or delay in the operation; that he ought to go right ahead as if it were a good quarry?

A. That is part of the contract procedure.

Q. July 12th, "Sent samples of binder and rock to the Bureau of Standards." That is an item in the diary. July 13th, "Contractor laid off other work. Continued work on coyote hole." July 14th, "Rock looks fairly good, though not of the best." July 16th, "Started crosscuts at thirty-foot depths. Completed crosscuts at sixty-eight-foot depth to twenty-two feet on each side." July 17th, "Con-

(Testimony of Levant Brown.)

tractor completed coyote hole with twenty-two-foot crosscuts at 35-foot depth. Don Steele approved quarry if material was mixed." Can you tell me what that meant, that he approved quarry if the material was mixed?

A. You heard Mr. Steele's testimony on that point, I think.

Q. What would be your interpretation of that entry in the diary? You have interpreted a lot of others.

A. My interpretation of that was that Mr. Steele approved the use of the quarry and some of the soft material in the bottom of the pit as long as it met the grading of the specifications.

Q. July 23rd, "Contractor shot quarry. It was a good shot and [136] loosened up lots of material." August 10th, 1937, "Have had contractor close up rolls but still have trouble getting grading." August the 11th, "Grading is closer but still a little under on No. 10." August the 12th, "Broke shaft of rolls." August the 21st, "Poor rock. Closed plant down at 10:00 P. M." August 23rd, "Contractor moved bucket line north to harder rock in the quarry." August 27th, "Closed plant down about 9:00 P. M. and wasted about seventy tons of rock. Changed bucket line due to poor rock in bottom of quarry." Do you think that those conditions didn't materially contribute to the contractor's failure to get that rock on the road in that one hundred twenty days?

(Testimony of Levant Brown.)

A. If you will add up the amount of rock wasted compared to the amount of rock produced you will find it is, oh, approximately one percent.

Q. Yes, but it also shows, doesn't it, the necessity for scraping around and picking out and trying to produce rock that you will let him put on the road from a quarry that never should have been used in the first place, doesn't it?

A. Well, it shows that some selection in the quarry was necessary. There are very few quarries in which you don't have to select the better from the poorer material.

Q. And when the material forms on a roll of a roll crusher and breaks shafts, you think that that material should be run through the crusher?

A. I think the contractor had gotten down into the poorer material [137] underneath the hard material and it was an error in judgment on his part to continue using—to have continued attempting to use that material. I have the very highest opinion of Mr. Johnson's construction experience. I think he is an experienced contractor, but we all make errors in judgment. I think this was a case where an error in judgment occurred.

Q. You don't think there was any error in connection with designating this as a rock quarry satisfactory for that job?

A. No.

Q. And you don't think——

The Court: How in your opinion could he have gotten the oil rock at this location, Mr. Brown?

A. Well, there were some twelve to fifteen thou-

(Testimony of Levant Brown.)

sand tons, your Honor, of good rock produced before any difficulty occurred. That was the rock which was on top of the poorer rock. It was shot, all shot up and dropped right in place. It was shattered. The poorer rock, or the better rock was taken off the top. If he had started producing his cover material at that time he certainly could have produced all of the materials required on that end, on the easterly or southerly end of the project, which was only nineteen hundred tons from the twelve or fifteen thousand tons of good material. Subsequently when he got down in the poorer material, that is in the softer material in which, as the superintendent explained, the man driving the coyote hole made thirty feet in a day, if he immediately suspected that was softer material when he got in that particular portion of the quarry he should have [138] expanded his operation to either side. Eventually he moved to the location four hundred feet further up Bear Creek, from which he got, I think, according to Mr. Steele's calculation, some 4,000 tons. Bearing in mind that, there was some twelve to fourteen thousand or fifteen thousand tons of good material taken out before any real difficulty had occurred.

Q. Did you say that there were twelve or fifteen thousand tons taken out before they had any difficulty occur?

A. Before any real difficulty occurred.

Q. Before any real difficulty occurred?

A. Yes.

(Testimony of Levant Brown.)

Q. You heard the contractor's superintendent testify that almost from the start there was so much soft material in it they couldn't produce oil rock. Do you think that they are wrong in that?

A. I think that is a misstatement, if I might go as far as to make it as strong as that.

Q. Uh huh. Well now, on August 10th the Resident Engineer was having trouble with too much soft rock, wasn't he? How many tons had been produced by August 10th?

A. I don't know as there was any trouble on August 10th. They started production on August 9th.

Q. He says he was having trouble getting grading. Isn't that trouble?

A. That was when the plant first began operations. If you will look at the production record you will ascertain that in the first [139] four days of operation he only produced about 2,000 tons, I think it was.

Q. That is August 10th and 11th, having trouble getting grading.

A. If you will go back a few days you will find he started operations along about the 6th or 7th. He started crushing rock, adjusting the plant so as to get the proper grading.

Q. On what dates is that, August what?

A. About the 6th or 7th.

Q. That is about four days.

A. I think the diary indicates that he was plac-

(Testimony of Levant Brown.)

ing crushed rock. He used that material to place it around the plant.

Q. Now on August 12th they broke their first shaft. That is six days after you say they started to operate. Now did they produce 15,000 tons before they broke that first shaft?

A. No. They produced 15,000 tons, fourteen or fifteen thousand tons, about the latter part of August.

Q. So if the shaft broke on August 12th, you don't think it was due to any soft material that they were encountering there?

A. I have no—I can express no valid opinion on that. I did not see the operation.

Q. Well, it was your opinion he could have been producing oil rock, and if there wasn't too much soft in it on August 12th, now, can't you give us your opinion just as well as to what broke the shaft as you can as to why he could have been producing oil rock? [140]

A. No. I don't think I am in a position where I can make a valid reply to that.

Q. And on August 21st, when your man says poor rock closed plant down, that is fifteen days after August 6th, and in that time a shaft had been broken and the plant had been closed down four days for that shaft to be replaced; so we will take four from fifteen and that gives eleven days, and in that first eleven days when they had difficulty grading and were stowing rock around the plant the first few days, it gets us down to a pretty small

(Testimony of Levant Brown.)

length of time in which to produce 15,000 tons of rock before they encountered bad rock, wasn't it, when your own man's diary says poor rock closed plant down?

A. I didn't consider they had had any material difficulty until about the latter part of August. I think if you will refer to the production records you will see he was shut down, the plant was shut down, like the superintendent said, any number of times because of slides in the quarry engulfing the bucket possibly.

Q. That would be an hour or so?

A. Possibly it would not be shut more than an hour or so.

Q. That is right. That is right.

A. But there are any number of notations of that.

Q. But we do know when the shaft broke on August 12th that it took four days to get a shaft and replace it in there. It was shut down four days then. And we do know on August 21st your own engineer, Mr. Wood, says he closed the plant down because of poor [141] rock in the quarry. Now should they have been producing oil rock from that poor rock in the quarry on August 21st?

A. No, I shouldn't think they would be producing oil rock from poor rock.

Q. No.

A. All the testimony has been that they can't produce oil rock from poor rock.

(Testimony of Levant Brown.)

Q. On August 27th the item was, "Closed plant down about 9:00 P.M. and wasted about 70 tons of rock." August 28th, "Closed plant down at 9:30 P.M. due to poor rock." August 29th, "Contractor hauled rock onto Pondosa road." That was poor rock that he was wasting on that road?

A. He was getting that poor material out of the quarry so he could carry on his operations more efficiently, I assume.

Q. August 31st the notation in the diary is, "Closed plant down at 7:30 P.M. because of soft rock. Too much soft for proportion of hard rock. Steele, McCoy and" somebody else whose name I can't make out, "were here and ate lunch with contractor." September 1st, 1937, "Contractor did not place rock on road because there was not enough hard rock available in quarry. Sent for shovel to use in the quarry." September 2nd, '37, "Started erecting plant at Station 870. 60 cat and dozer cleared top of quarry. Continued coyote hole." That is a coyote hole evidently they were putting in at the new quarry they had located, or what do you folks call it? Oh, that is the old quarry. September 3rd, 1937, "Shot quarry at [142] 5:00 P.M. Only about thirty percent of shot was good enough to use. 8,000 tons shot." "9-6-37. Contractor started up at 3:00 P.M. Bay City shovel prospected around for available rock. Broke shaft in rolls at 9:00 P.M."

September 7th, 1937, "Plant started up at 5:00

(Testimony of Levant Brown.)

P.M." It broke down at that time just from 9:00 P.M. one day to 5:00 P.M. the next day.

September 9th, 1937, rolls again broke. "Plant broke down about noon Broke shaft in rolls. Last night contractor hauled rock from new quarry up Bear Creek. Sent sample of rock of new quarry to District Office." Is that new quarry he refers to the second face of that same quarry?

A. Yes.

Q. That is the second face? A. Yes.

Q. That wasn't called the second face at the time the notations were made, then. It was a new quarry to him at the time, I say. September 11th, "Started plant after fixing rolls at 7:00 A.M. Hauled from new quarry." 9-13-37, "Moved into quarry 2 at about 9:00 A.M. Rock looks pretty good from new quarry thus far. Talked to Denison regarding available rock in quarry. Moved into quarry No. 1 9:00 P.M."

"9-18-37. Rolls broke down at 4:00 A.M. with only 200 tons to complete at this setup. Let contractor place balance of rock without rolls, wasting part of one-half to one inch rock. [143] This met the grading requirements."

"9-19-37. There is apparently plenty of hard rock in the upper quarry at Bear Creek for chips but due to roll shaft breaking causing delay of time the contractor elected, with my approval, to make all of chips from plant at Station 870."

The Court: What does that mean? Where was Bear Creek and where was 870?

(Testimony of Levant Brown.)

Mr. Lichty: Bear Creek is the second quarry.

Mr. Langley: That is the one where all the trouble was.

Mr. Lichty: The Lower Bear Creek and the Upper Bear Creek. Those are the two troublesome quarries. The other was the gravel pit.

The Court: Where was 870?

Mr. Lichty: 870 is the gravel pit.

Q. Now with that record from the diary before you, the trouble in getting hard rock out of that quarry, trouble in meeting grading specifications with it, trouble in shafts breaking, would you say that the quality of this rock had anything to do with it?

A. My reply to that is that the production record stands for itself.

Q. Now what does the production record show? How long did it take him to produce approximately the equivalent amount of material for the road from the gravel pit?

A. He had produced that in approximately twenty-three days, I think. He produced from the gravel pit about a thousand tons a day.

Q. In twenty-three days he did as much work as he had done in how [144] long at the other place?

A. Oh, from August 9th to September 18th; say forty days. That is ordinarily the evaluation of the difference between crushing gravel and crushing rock.

Q. If you have a good rock quarry setup, you

(Testimony of Levant Brown.)

think you could produce from gravel that much faster? A. Ordinarily that is the case.

Q. Ordinarily that is true?

A. That has been our experience.

The Court: Did you move the crusher down to the gravel pit?

A. Yes, sir.

Mr. Lichty: Yes.

Q. Now the notation in the diary of September 3rd, where it says, "Shot quarry at 5:00 P.M. Only about thirty percent of shot was good enough to use. 8,000 tons shot." Would you say that a quarry where you shoot 8,000 tons and only thirty percent of it is good enough to use would be a satisfactory quarry?

A. No. I would say that Mr. Johnson should have moved to one of the other outcrops in that locality sooner than he did.

Q. Did anyone suggest to him that he do that at any time?

A. Mr. Johnson came to San Francisco sometime about the 14th of September, I think it was. He testified that he saw me and that I referred him to Mr. Potter. He had to wait over Sunday. I think he was mistaken as to seeing Mr. Potter. He saw Mr. Dennison. Mr. Dennison is our District Construction Engineer. We have a [145] memorandum in the files from Mr. Dennison dated September 14th covering his conversation with Mr. Johnson that day.

Q. I object to your testifying to anything that

(Testimony of Levant Brown.)

Mr. Dennison has written down as the substance of a conversation he had with Mr. Johnson. Is that what you contemplate doing?

A. The files are under my direction.

Q. I don't care what they are, I am making the objection and I will ask the Court to instruct you that you can't testify to hearsay.

The Court: He has not said what he told him. He just said there was a memo.

Mr. Lichty: Q. You never told Mr. Johnson to prospect for other rock, did you?

A. I don't recall Mr. Johnson's visit. Mr. Johnson said he saw me. I have no reason to doubt but what he did, but I——

Q. You don't remember telling him to prospect for rock?

A. I don't recall Mr. Johnson being in there at all.

Mr. Lichty: All right. That is all.

Redirect Examination

By Mr. Langley:

Q. Well, this calculation that you made took into account the times the plant was down, did it?

A. That was the actual time, the actual time of performance as contained in the records of the project.

Q. The only days that were excluded were Sundays and holidays, [146] weren't they?

A. Well, the Sundays and holidays were not excluded, because they were included in the total calendar days of the time.

(Testimony of Levant Brown.)

Mr. Langley: That is all.

Mr. Lichty: No further question.

(Witness excused.)

Mr. Langley: The Government rests, your Honor.

Rebuttal

Mr. Lichty: Mr. Johnson, will you take the stand again?

HOMER G. JOHNSON,

the plaintiff, was recalled as a witness in his own behalf, in rebuttal, and, having been previously sworn, further testified as follows:

Direct Examination

By Mr. Lichty:

Q. Mr. Johnson, you have heard the testimony here relative to the lateness in getting started on this job. On June 3rd you received a letter, did you not, telling you to do nothing on this until they notified you?

A. Yes. I received some copies of the contract and one thing and another, a general specification book, I think, and it said just because they were sending those that was no intimation that I had a contract; that I would be notified when the award was made in Washington and not to do anything until such time as I was notified [147] of that.

Q. And you were notified the first time by telegram, which you received on July 9th?

(Testimony of Homer G. Johnson.)

A. Yes, sir. I actually got the message on July 9th—or June 9th, I should say.

Q. June 9th? A. June 9th.

Q. Now on a job of this size, Mr. Johnson, how long does it ordinarily take for a contractor to get his plant organized, his crew organized, his foremen, and where the job is the distance away that this one was, to move in and begin operation?

A. Well, about sixty days is about as good as I have ever done on a difficult layout like that. And then there was a condition in there also. That was during this period of unemployment through the country. In other words, they said we would have to get our men through, practically all of our labor through the employment office at Dunsmuir, the Government Employment Office at Dunsmuir. Of course we had to give them notice and after so many hours or days of waiting if they didn't furnish anybody then we could go out and get some men. But we were tied down pretty much by that.

Q. You say on a job of this character it is normally about ninety days from the time you get notice to proceed until you actually begin placing rock in place on the road? That is what you mean?

A. Well, I said it is sixty days, about as good as we ever do with [148] that much equipment.

Q. Sixty days?

A. Especially that far away.

Q. Now you said you did have a man down there with a compressor and drills starting your coyote work on about what date?

(Testimony of Homer G. Johnson.)

A. Well, around the last of July, around the 27th, 28th or 29th of July.

Q. Your man, according to the diary——

A. Or June, I should say.

Q. ——arrived about the 28th of June, did he not? A. Yes, about the 28th of June.

Q. So that is about eighteen days after you had notice that you had actually been awarded the job?

A. Yes. In the meantime we had made a trip down and made preliminary inspection. We were doing work here preparatory to getting equipment down there.

Q. Now Mr. Johnson, if this quarry had not developed to be full of this soft stuff and you could have operated as you would have ordinarily in an ordinary commercial quarry, running three shifts a day, as you did, how much rock could you have produced in a day of three shifts?

A. Well, I think we run around, say around 850 to 1100 tons a day out of the quarry, and we done slightly better out of the gravel pit.

Q. You actually did out of that quarry run that much? [149]

A. Yes, when the rock was good and fairly hard and we could keep going.

Q. And there were how many tons of rock required for this job?

A. About 44,000 tons of surfacing and three or four thousand tons of oil rock.

Q. About forty-seven thousand tons?

A. Uh huh.

(Testimony of Homer G. Johnson.)

Q. Then in your opinion forty-five days approximately after you started crushing you could have completed that job had the rock been satisfactory?

A. Yes. We would have had to have allowed a little bit for moving the plant. That would have taken a few days of lost time. But where our greatest difficulty was was the fact we could not produce oil rock while we were running that road rock from the quarry and on account of the rock being too soft to do that. If we could have got out our oil rock then we could have covered all that east end of the road that was surfaced and got the prime coat on and covered it with asphalt, if we had had any oil rock out to do it with.

Q. Now Mr. Johnson, this map that Mr. Steele prepared here, let's look that over. Now he has a designation on here at a spot on a road that is indicated on the map on which the quarry is not located. He has three-tenths of a mile marked there. Where did the stakes that the engineers had set for the road run?

A. They run right over to the old quarry. [150]

Q. They didn't follow the road?

A. Didn't follow this road out here. I don't know whether there was any other road there or not.

Q. But they had actually put their stakes in along the other road into the quarry?

A. Into the quarry.

Q. And in measuring the three-tenths of a mile

(Testimony of Homer G. Johnson.)

from that highway to the quarry you didn't anticipate that you would go along some road where the quarry didn't exist, did you?

A. No; or where the road didn't exist.

Q. This road didn't exist?

A. I don't think it did. I don't know. I don't remember of a road there.

Mr. Lichty: That is all.

Mr. Langley: No questions.

(Witness excused.)

Mr. Lichty: That is our case, your Honor.

Mr. Langley: We have nothing further, your Honor.

The Court: Would you like to argue the case in the morning?

Mr. Lichty: I would like to very much.

The Court: Tomorrow morning?

Mr. Langley: Sure. It is agreeable with me. I am willing to submit a brief. It makes no difference to me.

The Court: You would like to argue, would you, Mr. Lichty?

Mr. Lichty: I don't care; whichever your Honor wants. If your [151] Honor would rather have briefs I will submit briefs. If you would rather hear oral argument I will do that.

The Court: I would rather you lawyers would make the decision yourselves. I will be here and won't be engaged tomorrow morning and if you would like to be heard in oral argument if you will be here I will be here.

Mr. Lichty: I will be here tomorrow then at 10:00 o'clock and be prepared to argue it.

Mr. Langley: Very well, your Honor.

(Thereupon, at 5:14 o'clock P. M., Court was adjourned.)

[Title of District Court and Cause.]

Portland, Oregon, Tuesday, June 13, 1944
10:10 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. John Lichty, Attorney for Plaintiff.

Mr. William Langley, Assistant United States Attorney, appearing for United States of America, Defendant.

PROCEEDINGS

The Court: Proceed, Mr. Lichty.

Mr. Lichty: Your Honor, we are now ready to proceed to prove damages in the case of Johnson vs. the United States of America. I will call Harry Stewart. [153]

HARRY A. STEWART

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. Your name, please?

A. Harry A. Stewart.

Q. What is your position?

A. I am an accountant serving with and for Homer G. Johnson.

Q. And, Mr. Stewart, have you gone over the diary of Joseph E. Wood, the Resident Engineer for the Bureau of Public Roads, which was introduced in evidence in this case?

A. Part of it, yes, sir.

Q. Have you prepared from that diary a summary of the various breakdowns that were reported in the job which was undertaken by Homer Johnson that is under controversy in this case?

A. I have.

Mr. Lichty: May I have the payroll that was introduced in pre-trial? I will ask that Pre-Trial Exhibit 29, I believe it is, be introduced in evidence at this time.

Mr. Langley: Just a minute. Your Honor, I want it identified.

Mr. Lichty: Well, that was the purpose of pre-trial.

Mr. Langley: Nobody identified it there. All they did was hand it in to the reporter.

(Testimony of Harry A. Stewart.)

Mr. Lichty: No. It was identified as the payroll. The man [154] was here.

Mr. Langley: Nobody was put on the stand.

Mr. Lichty: That is right. And I handed it in and I said, "This is the duplicate original payroll from this job." Now if there was any objection the time to object was at pre-trial, not at trial.

Mr. Langley: I think that is the purpose of pre-trial, it it not, your Honor?

The Court: Do you have any doubt of its authenticity?

Mr. Langley: Yes, I do.

The Court: Well, you have your client here. He can certify to it.

Mr. Lichty: Why, surely he can.

The Court: All right. Step off.

Mr. Lichty: You wish me to have him on the stand?

The Court: Yes. Step off the stand.

(Witness withdrawn.)

HOMER G. JOHNSON,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: Your name is Homer G. Johnson?

The Witness: Yes, sir.

(Testimony of Homer G. Johnson.)

By Mr. Lichty: [155]

Q. Mr. Johnson, I hand you Pre-Trial Exhibit No. 29. I will ask you what that consists of.

A. Well, this is a certified payroll that was required on the contract. All of those contracts at that time required the contractor to submit a certified payroll each week of how many he had employed and where he employed them and what they were doing.

Q. And these are duplicate originals of that payroll?

A. Yes, those are duplicate originals, and some of them are originals and the duplicate was sent in to the Public Roads at San Francisco.

Q. How often were they sent in?

A. Every week.

Q. And these have been in your file ever since that job?

A. Yes, sir.

Mr. Langley: You say the originals are with the Bureau of Public Roads?

A. Well, some of the originals we kept and some of the copies were sent to them, and then vice versa.

Mr. Langley: Now where is the original, is what I want to know?

A. Well, some of these here are originals and then some of them are duplicates of the originals.

Mr. Langley: Now where did you get the information that you made these up from?

A. These here? [156]

Mr. Langley: Yes.

(Testimony of Homer G. Johnson.)

A. Well, it was made up by the timekeeper.

Mr. Langley: You have no personal knowledge of that yourself, then, have you, of the correctness of those items on there?

A. Well, a great many of them I certified to them. I should have.

Mr. Langley: Well, the information on there was taken off of the timekeeper's reports; is that correct?

A. Well, I signed all the checks.

Mr. Langley: Answer my question "yes" or "no". Where did you get the information that you put on that payroll?

A. Well, the bookkeeper. That time was turned in by the foremen to the bookkeeper, then the bookkeeper made these up and made up the checks for the men, and so forth, and I checked over them and certified the payroll and signed the checks for the men.

Mr. Langley: You were not the timekeeper, were you?

A. I wasn't the timekeeper, no.

Mr. Langley: You were not the bookkeeper were you?

A. No, I wasn't the bookkeeper.

Mr. Langley: And you have no personal knowledge of the correctness of the items?

A. Yes; because I always checked these. If we made a mistake on them we generally were called on the carpet and the things were checked. The time-

(Testimony of Homer G. Johnson.)

keeper got them all together, sat down and checked them over.

Mr. Langley: Who prepared those? [157]

A. A man by the name of Murphy.

Mr. Langley: You didn't prepare them. did you?

A. Part of these. Now another part was prepared by another man. 1938 was prepared by another man, and 1937 was prepared by Murphy and most of the time myself.

Mr. Langley: Did you prepare any of them yourself?

A. No. I didn't do this writing, any of it, myself.

Mr. Langley: No. Well, I object to it, your Honor, on the ground it is hearsay.

The Court: Admitted subject to the objection.

Mr. Langley: I would like to cite authorities: Chaffee & Company vs. United States, 18 Wall. 516; Radtke vs. Taylor, 105 Or. 559. My objection goes that it is hearsay.

The Court: Admitted subject to the objection.

(The document labeled "Payrolls - California Job. Homer G. Johnson. From June - 1937 to Aug. - 1938", so received, having been previously marked Plaintiff's Pre-Trial Exhibit 29, was further marked "and trial".)

Mr. Langley: Now I have one further question. Now you say the original of that was handed to the Bureau of Public Roads; is that correct?

A. During a part of the time. Now I wouldn't

(Testimony of Homer G. Johnson.)

say. During the year of 1937 I think it was our intentions to give them duplicates—to give them originals and we keep duplicates, while in the year 1938 we kept the originals and gave them the duplicates.

Mr. Langley: And this is not an original document, then, is it? [158]

A. Part of it is.

Mr. Langley: Well, I object to the part that is a duplicate on the ground that it is not the best evidence.

The Court: Admitted subject to the objection.

Mr. Lichty: Q. Mr. Johnson, they were all prepared in one writing, were they not?

A. Yes, they were.

Q. The carbon underneath the first sheet, and the second, if it is a carbon, is an exact carbon copy of the original? A. Yes, they are.

Q. If it is an original an exact copy was sent to to the Bureau?

A. Yes, sir. I know that is the way Murphy was preparing them all the time he was on the job.

Mr. Lichty: That is all.

Cross Examination

By Mr. Langley:

Q. Mr. Johnson, are you sure of your answer? Look over that payroll and make sure you are answering that question correctly.

(Witness examines document.)

Mr. Lichty: I don't think it is the intention——

(Testimony of Homer G. Johnson.)

A. It is a little difficult to tell. Some of them look like originals and some look like duplicates, but anyway they were all made from carbons and they are exact copies of one another, or exact duplicates of what was sent in officially to the Bureau of Public Roads as the official payroll. [159]

Q. And this exhibit that you have there is an exact copy of the one that was sent in to the Bureau of Public Roads; is that correct?

A. Well, yes. In other words, they were supposed to be exact copies.

Q. I don't want what it was supposed to be. Is it? Is it, is what I am asking you? Is it an exact copy of the one that you sent in to the Bureau of Public Roads?

A. Well, that is as far as I know.

Mr. Langley: That is all.

Mr. Lichty: That is all, Mr. Johnson.

(Witness excused.)

The Court: Come back.

HARRY A. STEWART,

having been previously sworn as a witness in behalf of the plaintiff, resumed the stand and further testified as follows:

Direct Examination (Continued)

By Mr. Lichty:

Q. Mr. Stewart, have you prepared from the

(Testimony of Harry A. Stewart.)

payrolls and from the engineer's diary a summary of the cost and expense of the repairs to the crusher equipment occasioned by the breakdown of the rolls of the crusher? A. I have, yes.

Mr. Lichty: If it would help the Court any, I have here, not [160] as an exhibit but just to follow his testimony, his preparation.

The Court: I won't need it now.

Mr. Lichty: You don't need it. All right.

Q. First, have you examined the invoices of the cost of the crushers themselves, and the freight on the crushers, crusher rolls?

A. I have, crusher repairs.

Q. What was the cost as shown by Exhibit 30, which we offer in evidence, of these crusher rolls?

A. Do you wish me to give the details, or the total?

Q. Give the details.

The Court: Do you want to make an objection to Exhibit 30?

Mr. Langley: Yes. I will object to it on the ground it has not been properly identified; it is hearsay. It is a receipt. There is no testimony here it has been paid. Anybody could have made up that.

Mr. Lichty: Q. What is Exhibit 30?

A. The cost invoices.

Q. Exhibit 30 consists of bills for the crusher rolls to replace the rolls that broke, and they were placed in that crusher due to the breakdown because of the soft material?

(Testimony of Harry A. Stewart.)

The Court: Well, this man wasn't employed at the time.

Mr. Lichty: No, your Honor, and if at the pre-trial any objection had been made as to their authenticity we would have proved them. [161]

The Court: Well, I am interested in getting along. I am not interested in what might have been done or should have been done. Now just have him sit there and we will have Mr. Johnson identify the documents.

Mr. Lichty: Mr. Johnson, I hand you a bunch of documents clipped together, marked Pre-Trial Exhibit No. 30. I will ask you what these documents clipped together are. Begin right with the first. The first page is what?

Mr. Johnson: The first page is the shaft roll, one of the rolls of the crusher. It was for the roll, crusher roller in that plant that was broke. That is a bill for it. It was bought here at Portland.

Mr. Lichty: Was that bill paid?

Mr. Johnson: Yes, sir.

Mr. Lichty: Was that crusher roll installed in the crusher on the job in question here?

Mr. Johnson: Yes.

Mr. Lichty: Due to the breakdown of the roll?

Mr. Johnson: Yes.

Mr. Lichty: What is the second sheet?

Mr. Johnson: The second sheet was a bill to McCloud River Railroad Company steel machine shop there, and we had to take rolls in there and have them taken apart and get their machine shop to do

(Testimony of Harry A. Stewart.)

the work, putting in, or taking out the old shaft and putting in the new. [162]

Mr. Lichty: Was that bill paid?

Mr. Johnson: Yes, that bill was paid.

Mr. Lichty: What is the next sheet?

Mr. Johnson: The next one is another bill for roll shaft at a machinery house here in Portland.

Mr. Lichty: Was that shaft installed in the crushing equipment on that job?

Mr. Johnson: Yes.

Mr. Lichty: Due to the breakdown of the shaft, due to the soft rock?

Mr. Johnson: Yes.

Mr. Lichty: The bill was paid?

Mr. Johnson: Yes, the bill was paid.

Mr. Lichty: What is the next page?

Mr. Johnson: The next was express on a shaft from Portland down to the job, down to McCloud.

Mr. Lichty: That is the shaft just referred to?

Mr. Johnson: Yes, sir.

Mr. Lichty: That bill was paid?

Mr. Johnson: Yes, that bill was paid.

Mr. Lichty: What is the next sheet?

Mr. Johnson: It is a bill for another shaft for the roll crusher.

Mr. Lichty: Was that to replace a shaft broken on the job?

Mr. Johnson: Yes, sir. [163]

Mr. Lichty: Was the bill paid?

Mr. Johnson: Yes, sir.

(Testimony of Harry A. Stewart.)

Mr. Lichty: The shaft was installed in the crusher?

Mr. Johnson: Yes, sir.

Mr. Lichty: The next sheet?

Mr. Johnson: That is a bill for another roll shaft.

Mr. Lichty: Which was installed in that equipment?

Mr. Johnson: Yes.

Mr. Lichty: The bill was paid?

Mr. Johnson: Yes.

Mr. Lichty: It was necessary, due to a breakdown occasioned by soft rock on that job?

Mr. Johnson: Yes.

Mr. Lichty: The next sheet?

Mr. Johnson: The next sheet is an express bill from the Express Company for shipping a shaft from Feenaughty Machinery Company from Spokane.

Mr. Lichty: That was one of the roll shafts that was installed?

Mr. Johnson: Yes, sir.

Mr. Lichty: The next sheet?

Mr. Johnson: It is a bill for installing shafts there, doing this machine work, of the McCloud River Railroad Company, at various times when the shafts were replaced. The bill was for shafts replaced. [164]

Mr. Lichty: Are these all invoices that were submitted to you, which you have taken from your file?

Mr. Johnson: Yes.

(Testimony of Harry A. Stewart.)

Mr. Lichty: Any objection to the admission now?

The Court: Do you want to cross examine, Mr. Langley?

Mr. Langley: Where are the checks that were issued in payment of these alleged bills?

Mr. Johnson: They are at the office, I presume.

Mr. Langley: Well, I object to it on the ground that, so far as payment is concerned, it is not the best evidence. The receipt does not mean anything. They are hearsay. They ought to have the checks here that paid these bills.

The Court: They are admitted subject to the objection.

(The bills from Feenaughty Machinery Co. to Homer Johnson, etc., so offered, having been previously marked Plaintiff's Pre-Trial Exhibit 30, was further marked "and trial".)

The Court: Now continue this examination.
By Mr. Lichty:

Q. Now Mr. Stewart, what is the total amount of the cost of the roll crusher repairs as shown by these invoices?

A. As shown by the invoices which we have submitted here, the total cost would be \$629.63.

Q. Now have you, from the payroll, figured the time of the men [165] that was involved in making these crusher repairs on the job?

A. Yes. I have scrutinized the payroll for the men who were employed at the plant, which was shut down during the installation of these repairs,

(Testimony of Harry A. Stewart.)

and took an extract from there of their wages, what they were paid per hour.

Q. How many men were employed on the plant there while these repairs were going on?

A. Five.

Q. One plant man. What did he receive per hour?

A. Seventy-five cents per hour.

Q. A hoist man; how much did he receive?

A. \$1.25.

Q. An oiler; how much did he receive?

A. Sixty-eight cents.

Q. Feeder; what did he receive?

A. Sixty cents.

Q. Engineer; what did he receive?

A. Seventy-five cents.

Q. And what was the customary industrial insurance? A. Twenty-eight cents.

Q. A total hour cost of the men at the plant of \$4.31? A. Yes.

Q. How many hours were involved in dismantling and installing these shafts in each case?

A. The minimum so far as I could discover from the payroll at any [166] time was three shifts, twenty-four hours. Sometimes it was more. This I took from the payroll and also from the diary which was introduced.

Q. You figured a cost of how much on each installation? A. The labor cost?

Q. Yes. A. One hundred dollars.

(Testimony of Harry A. Stewart.)

Q. Your total cost of crusher equipment, freight or express, and machine work at the machine shop, and the labor for all of the installations, amount to how much in gross? A. \$1,029.63.

Q. Did you take from Mr. Wood's diary excerpts of the time that the plant was closed down while they were trying to eliminate soft rock from the material that was being produced? It will be your Schedule 2, I believe, or Schedule 4. No, that would be 2, wouldn't it? There is no 2 in mine.

A. I don't have anything in my summary directly on that.

Q. On that schedule you prepared for me you have an item 2, extra costs due to lost time on account of soft rock, \$660.10. Can you tell how that was figured? Oh, \$660.10 was merely the overhead and superintendence?

A. That wasn't in that I prepared.

Q. That is right. That is not in the schedule you prepared.

Mr. Langley: This schedule, are you going to put it in evidence? [167]

Mr. Lichty: No. That is, as I told the Court, merely a resume of his work, prepared for testimony.

The Court: You want one to follow?

Mr. Langley: Well, I ought to have something, or else it ought to go in evidence, one of the two.

The Court: You may have the one he gave me.

Mr. Lichty: I will be very happy to submit this to you here (passing paper to Mr. Langley).

(Testimony of Harry A. Stewart.)

Q. Then we will skip to the cost of producing oil rock. That is your Schedule 4. From the diary of Mr. Wood did you ascertain when the crushing operations at the gravel pit for the production of everything but oil rock ceased?

A. From Engineer Wood's diary I noted that under date of October 22nd, 1937, he had this notation: "Contractor completed running oversize that was stockpiled, through the plant."

Q. How long did the crusher and the plant operate at the gravel pit in the fall of 1937 subsequent to October 22nd?

A. It operated from October 23rd through November 4th, inclusive—including both dates.

Q. Have you from the payroll ascertained the cost of operation between October 23rd and November 4th?

A. I verified the summary which I found in the records from the payroll.

Q. What was the cost of operation during that time as shown by the payroll? First, just for labor and industrial insurance. [168]

A. For the labor \$9.44 per hour.

Q. And did you figure how many hours they operated during that time?

A. 192 hours of operation during that period.

Q. At \$9.44 an hour?

A. For the labor and industrial insurance.

Q. Yes. Now what is the usual and customary rental of the equipment that was being operated at that plant during that time?

(Testimony of Harry A. Stewart.)

A. Currently the custom is on rentals for the second shift of operation to charge a rental rate fifty percent of that charged for the first shift.

Q. And what are the amounts of the rentals per hour of the various equipment on that job for one shift?

A. The total for rentals and supplies, \$21.76 per hour for the first shift.

Q. Now what equipment does that cover?

A. It includes the shovel, trucks, four trucks altogether, and includes the crushers and screens of the plant.

Q. And you say the customary rental is fifty percent for the second shift—fifty percent of the first shift?

A. Yes, sir.

Q. That would make it \$32.64 for a day of two shifts? In other words, \$10.88 and \$21.76? That is an hour, rather?

A. Yes.

Q. \$32.64 per hour makes it? In other words, it would be \$21.76 [169] for eight hours and \$10.88 for eight hours?

A. The average hourly operating cost during that period was \$25.76, when you average the first and second shifts.

Q. When you get \$21.76 for the hours for the first shift and \$10.88 for the second, that makes \$32.64. Divide that by two gives \$16.32 an average per hour, does it not? (pause) \$16.32 just for rental, and you add the labor cost to that?

A. Yes, but you don't—you take fifty percent of that for the second shift.

(Testimony of Harry A. Stewart.)

Q. That is right. That makes \$16.32 an hour on the average for just rental, and add to that the \$9.44, which gives you \$25.76. It is on the last sheet.

A. Yes; that makes \$25.76. According to my computation, the average hourly rental cost would be \$16.32 per hour.

Q. And the labor cost?

A. Would be \$9.44 added to it.

Q. The total cost of labor and rental per hour is what? A. \$25.76.

Q. It operated 192 hours in just producing the oil rock after the shutdown for the material that had been stockpiled? A. Yes, sir.

Mr. Lichty: You may take the witness.

Cross Examination

By Mr. Langley:

Q. What was the total on that last item? [170]

A. The total of the 192 hours?

Q. The total cost, as I understood it?

A. Yes, sir.

Mr. Lichty: \$4,945.92.

Mr. Langley: Well, are you going to amend your complaint, then?

Mr. Lichty: I have asked, yes, in the complaint to change the figure on page 5 of the complaint, paragraph XIV, where they allege that the additional cost of producing oil rock from the gravel pit is \$1,467.84, I ask to have that figure deleted and to interline \$4,945.92.

Mr. Langley: No objection to his amendment.

(Testimony of Harry A. Stewart.)

The Court: Will you make that amendment, Mr. Clerk. They will give it to you afterwards. It is an interlineation. They will give it to you afterwards.

The Clerk: All right.

Mr. Langley: Q. Now, let's see. As I understand it now, you have testified about two items of damages: about the breaking and the cost of the roll shafts that broke, and about this extra cost of hauling oil rock; is that correct?

Mr. Lichty: Not of hauling oil rock.

Mr. Langley: Producing oil rock.

The Witness: Producing oil rock.

Q. All right. Now let's talk about the first one here. I wish you would take your payroll here. I want you to understand this, [171] Mr. Stewart: I am not questioning your actual cost. What I am questioning is your segregation. Now explain to me, please, and the Court, how from this payroll that you have here you segregate the cost. Will you do that? Now use the payroll.

Mr. Lichty: Hand him the payroll, Mr. Bailiff.

A. I think I testified that I verified this or made this up from the timekeeper's summary which I found in the files and the payroll. I took his summary and verified his summary from the payroll.

Mr. Langley: Just a minute. Then I object to all of this man's testimony, your Honor, on the ground it is hearsay. He is testifying from something that is not in evidence here, a timekeeper's diary or whatever it is. Where is that?

(Testimony of Harry A. Stewart.)

The Witness: I have it here among my papers.

Mr. Langley: Well, let's see it.

Mr. Lichty: Is that what you are referring to (passing paper to the witness)?

The Witness: Yes, sir.

The Court: Mr. Bragg, Mr. Langley wants this piece of paper.

Mr. Langley: Mr. Bragg, will you hand this to the witness.

Q. Where did you get the information that you made that up with?

A. That I made this from?

Q. Yes, sir. A. I didn't make that.

Q. Who made it? [172]

A. This was made by the bookkeeper on the job.

Q. What is the bookkeeper's name?

A. Mr. Murphy.

Q. And your testimony is that you made the segregations from that last document that was handed to you, plus the payroll; is that correct?

A. I verified it from the payroll.

Q. But you have no personal knowledge as to accuracy of that last paper that was handed you? Now you used——

The Court: Wait and see just what he said.

A. I verified the payroll elements of it from the payroll.

Mr. Langley: Q. Yes, and you were receiving it from somebody else's figures, not your own, weren't you?

(Testimony of Harry A. Stewart.)

A. Well, the payroll figures are certainly somebody else's. They are not mine.

Q. All right. You explain to us from all the documents you have there how you made your segregation so as to arrive at this analysis that you have there.

A. That has to do with the crusher reports.

Q. Yes; how you show that the five men that you claim are shown on that payroll worked on the crusher, worked on fixing the roll shaft on the particular day involved.

A. All I can show is that these men were the plant men which were employed at the plant at that time.

Q. That is correct. [173].

A. And the plant was not in operation, of course, while it was broken down.

Q. In other words, you cannot show from the payroll records and the information you have there, that the five men, or whatever men you were talking about, actually did work on the roll shaft repair; is that correct?

A. I can only say that these were the plant men employed at the plant when it was operating. That is all I can say, as shown by the payroll.

Mr. Langley: Then I object, your Honor, to this man's testimony, on the ground it is hearsay. It is based on supposition. He has no records there which show that these particular five men were actually employed in the work that he says they were employed on. He has jumped at a supposition they

(Testimony of Harry A. Stewart.)

were employed there, and because they were not doing some other work then they must have been working on the roll shaft. That is not proof of damages.

Mr. Lichty: We will tie that up, your Honor, with the foreman's testimony.

The Court: That goes to its weight.

Mr. Langley: Q. Mr. Stewart, can you tell us how you made your cost segregation on the payroll?

A. The cost of what?

Q. Well, the cost of anything on the payroll. How do you segregate the cost? You have got down there a man's name, how many hours he worked and how much you paid him. How do you show on the [174] payroll he did the particular type of work?

A. The payroll shows whether he was a blade operator or a roll operator, or a crusher man or engineer, or hoist man. The payroll shows that.

Q. And that is the way you make your cost segregation, then, is it?

A. Yes, sir.

Q. Do you know where the original time sheets are, Mr. Stewart?

A. Payroll sheets?

Q. The original time sheets. The original payroll sheets or time sheets or whatever you want to call them.

A. As I understand it, at least part of these are the originals.

Q. I mean the original time sheets, what the timekeeper keeps.

A. Well, this is only hearsay, but I talked with the foreman on the job and he said *he* made those things up each night themselves.

(Testimony of Harry A. Stewart.)

Q. From the timekeeper's reports; is that correct?

A. He was, you see, timekeeper; he put down here himself each evening for his report to me.

Q. In other words, then the timekeeper prepared that payroll then; is that correct?

A. That is it.

Q. Johnson testified he prepared it?

A. Oh, no.

Mr. Lichty: Oh, no, no. I think that is a misstatement, your Honor; and it is argumentative anyway. [175]

Mr. Langley: Q. When does it show that the timekeeper came to work on the job, on the payroll there?

A. The part which I am talking about, that was kept that way, was in the summer of '38 when the job was completed.

Q. We are talking about '37, when this roll shaft broke, and so forth.

A. '37? I don't know. I haven't talked with anybody who helped make up the original payroll.

Q. Do you know where the original cost distribution sheets are? A. No.

Q. Do you know whether there are any original cost distribution sheets?

A. No, I don't know whether there are any or not, except this distribution sheet here by Mr. Murphy, as I mentioned before, is one of them.

Q. Now you are an accountant. If there are no

(Testimony of Harry A. Stewart.)

original cost distribution sheets how did the time-keeper make his distribution of how these men worked?

A. The payroll shows where they worked.

Q. It shows what their job was, not where they worked. All that payroll is, it shows that a certain man was employed as a blade worker, something like that, just his title. That doesn't show where he worked, does it?

A. It certainly shows he would be working on the road, not in the plant, and if he was a crusher man he would be working at [176] the plant, not out on the road someplace.

Q. So you make your entire distribution upon the label that is made on that man's distribution on the payroll; is that correct?

A. That is what I have done.

Q. That is the basis for your cost distribution?

A. Well, from work I have done, that is very well verified as shown on the payroll.

Q. Mr. Stewart, did you attempt to determine the separate costs for pouring and crushing, or was the entire pouring and crushing cost kept as an item of cost of crushed rock in the bunkers?

A. I didn't follow your question clear through.

Q. Did you attempt to determine the separate costs for pouring and crushing, or were the entire pouring and crushing costs kept as one item of cost of crushed rock in the bunkers?

A. Between quarrying and crushing I didn't attempt any breakdown, no.

(Testimony of Harry A. Stewart.)

Q. Well, now, isn't the extra cost for the pouring and not for the crushing?

A. That is something I am not informed on. I wasn't on the job and that is something I could not answer.

Q. How long have you been employed by Mr. Johnson? A. Two years.

Q. You are familiar with the contracting business, I suppose?

A. Just what I have learned in that time. We haven't run a job in that time. [177]

Q. You were not employed by him in 1937 and '38, then, I take it? A. No.

Q. Now wasn't the contractor paid \$2.00 per ton for his producing and placing the cover material on the road?

A. I would just have to verify that from the contract. I don't know.

Q. And if that is true he was paid \$2.00, whatever extra cost was involved in it?

A. What material is it you are talking about, oil rock?

Q. I am talking now about the increased cost of the oil rock.

A. As I said before, I hadn't been on the job, but from what I have been able to learn this oil rock is a by-product of normal crushing operations and if things had been normal the oil rock would all have been on hand when they were ready to use it, but the oil rock, as I understand it, could not be made out of this quarry. Therefore, when they were

(Testimony of Harry A. Stewart.)

ready to use the oil rock they had to run an operation for 192 hours there in order to produce it and run and waste a lot of rock that wasn't necessary.

Q. The point I am getting at is that the contractor was paid \$2.00 a ton. Now then, you are claiming increased cost. If he is already paid \$2.00 a ton how do you account for the increased cost?

A. Well, we have got to get down to—we have got to be definite here. Increased cost of what?

Q. Producing the cover material. [178]

A. This oil rock?

Q. Yes.

A. All right. It comes back to just what I said. If the quarry had been a normal quarry and the rock had been normal, the oil rock would have been a by-product of the operations and there would have been no extra cost; they would not have had to run the last 192 hours that they ran; but it wasn't. They could not make the oil rock from what was available in that quarry.

Q. Well, they had to make it anyway down there at Station 870, didn't they?

Mr. Lichty: I believe, your Honor, that is argumentative. I don't believe it is getting anywhere on the thing. We have our position and he has his. I object to the form of the question, that he is getting argumentative with the witness.

Mr. Langley: Q. Mr. Johnson's original claim charged 48 hours. Now you are charging 192 hours. How do you explain that?

(Testimony of Harry A. Stewart.)

A. Why this complaint was amended to that figure?

Q. Well, you are now claiming 192 hours. How do you justify that?

A. Once more it comes back to what I said. The entire operation was from October 23rd to November 4th, which was necessitated by the failure of the quarry to produce this oil rock. Therefore—

Q. How do you get—oh, excuse me.

A. Therefore for that period, October 23rd to November 4th, inclusive, they ran two shifts a day, with the exception of one Sunday, I think, to produce this oil rock that was required for [179] the surface, and in order to get this oil rock out they had to process a lot of rock, a lot of gravel, which would not answer the specifications and was wasted. So that the whole operation was made necessary by the failure of the quarry to produce the required oil rock. Of course, I wasn't there but you are asking me and I am telling you what I learned by inquiry.

Q. Well now, how do you get that 120 hours off of the payroll?

A. One hundred ninety-two?

Q. 192, yes.

A. Well, the payroll shows the plant in operation 192 hours. The plant men were all on duty those hours.

Q. And if the payroll shows that a blade man—if a fellow was employed as a blade man, you are

(Testimony of Harry A. Stewart.)

just assuming that he worked as a blade man during that time; is that correct?

A. Yes. But the blade men's cost didn't enter into this. This is plant cost.

Q. All right. Give me the title of some man that worked in the plant, then.

A. Well, engineer, for example; crusher man.

Q. All right. If you have got a crusher man there you are taking it for granted then that he was working in the crusher; isn't that correct?

A. I am.

Q. It is possible, isn't it, that he might have gone to town that day to do an errand for Mr. Johnson, or something like that, isn't [180] it?

A. Normally that is not done. But once more I will say I wasn't on the job.

Q. And we haven't anybody here that has testified that is correct. A. I don't know

Mr. Langley: That is all.

Mr. Lichty: That is all, Mr. Stewart.

(Witness excused.)

Mr. Lichty: Mr. Hildeburn.

The Clerk: Will you state your name, please?

Mr. Hildeburn: Harry Hildeburn.

HARRY HILDEBURN

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. Mr. Hildeburn, you testified in the former trial here, did you not? A. Yes.

Q. You were the superintendent for Mr. Johnson during 1937? A. That is right.

Q. The question has arisen as to the operations on the job there subsequent to October 22nd, 1937. What was the only operation being carried on there after October 22nd, 1937? [181]

A. The production of oil rock.

Q. Now the entire payroll, then, between October 23rd and November 5th, would be for pay for men who were engaged in that operation?

A. Yes.

Mr. Langley: Now just a minute. I object to that on the ground it is hearsay. The payroll speaks for itself. Now he has got the payroll in he is going to back it up.

Mr. Lichty: Which one are you going to hang on? You say we can't use the payroll because the man who made it is not here. Now you say the man who worked on the job can't testify.

The Court: All right. He has had his say; now you have had your say. Now continue, subject to the objection.

Mr. Lichty: Q. You were there, were you?

(Testimony of Harry Hildeburn.)

A. Yes, sir.

Q. Was the entire payroll between October 23rd and November 5th payroll for the production of that oil rock?

A. Well, if the payroll showed men working around the plant I would say yes, although we might have done some little odd jobs out on the road, like opening up a ditch or something of that kind, but had we done so the payroll would have showed road work, I am quite sure.

Q. Will you take the payroll and examine that period between October 23rd and November 5th and tell us how many men were working continuously during that period in and around the plant and the pit [182] producing oil rock?

Mr. Langley: I—

The Court: Do you want to object?

Mr. Langley: I just wonder, are you going to testify from your independent recollection, or are you going to read it off that payroll?

A. I certainly would have to read it off the payroll. I could not testify to something when I wasn't there.

Mr. Langley: I object to his testimony, then, as being incompetent, irrelevant and immaterial. It does not add to anything here. He didn't prepare the payroll. He doesn't know it is accurate or not. All he is doing is reading what somebody else entered.

The Court: He may answer subject to the objection. Will this take some time?

(Testimony of Harry Hildeburn.)

Mr. Lichty: Just run over the sheets from day to day to the end.

The Witness: Well, I haven't seen the payroll for seven or eight years.

The Court: Let him take it in the back of the room there and go on with something else.

Mr. Lichty: I will withdraw the former question.

Q. How many men, Mr. Hildeburn, were operating in the gravel pit and around the crusher producing this oil rock at a time during this operation? [183]

A. Well, I don't know.

Q. Well, you would have on the crusher—what would you have on there?

A. Well, there would be eight or nine men, I would say. But that is a long time to remember how many men we had. There would be a shovel operator, an oiler, and three or four men around the plant, and truck drivers, a roustabout and one thing and another. I would say as a rough estimate it would be anyhow ten men, if not more. I could look on here and find out how many.

Q. All right. Just look on there and find out how many. Just pick one out and see how many men were being paid the first day, October 23rd. We will see how many men were being paid on that work that day.

A. October 23rd? Well, I count thirty men here but I can't find just where it shows what they were doing.

(Testimony of Harry Hildeburn.)

Mr. Langley: That is just the point.

Mr. Lichty: May I see that a minute, Mr. Hildeburn?

(The witness passed document to Mr. Lichty.)

Q. Is there a column on this payroll that is kept to show the job on which the man is occupied?

A. Well, I didn't see any. That is what I was looking for.

Q. What is this column here (indicating)?

A. Oh, yes. But it is not very specific. Yes; it shows foreman, laborer, several laborers, shovel operator, truck drivers, and another foreman, laborer and truck drivers; and it also shows [184] roller operator. I don't know what the roller operator would be doing at that time.

Q. I believe he worked for one or two days after the 22nd, didn't he, after the distribution on the road had stopped?

A. That would be possible.

Q. All right. Look over now about to the 27th, we will say. Turn to that and see who was working at that time.

A. It seems to jump from the 23rd to October 30th.

Q. All right. October 30th, then.

A. It shows seventeen men working on that date.

Q. What were the occupations as designated?

A. Truck driver, blade operator, laborer, foreman, laborer, timekeeper, truck driver, truck driver,

(Testimony of Harry Hildeburn.)

laborer, laborer, crusher man, truck driver, laborer, truck driver, truck driver, shovel operator.

Q. Now what was the work being done at that time?

A. Well, I think we were producing oil rock.

Q. Don't you know you were?

A. Well, I heard the testimony of Mr. Stewart here and he testified that we were making oil rock at that time, but that has been six years ago and I think we were making oil rock all right in the neighborhood of that time, but to say that we were making oil rock on that particular day, why, it would be kind of hard for me.

Q. Do you know what happened in that job toward the end of that season, how many days approximately it took you to operate? [185]

A. We were somewhere in the neighborhood of a month and a half in making oil rock. I do remember that.

Q. And as you had crushed the ordinary grade material from that gravel pit you were able to stockpile some oil rock, were you not?

A. Yes, and we stockpiled—well, as we got out the road material we stockpiled oversize boulders for the purpose of making oil rock and then after the road operation was finished we crushed these boulders and made oil rock out of the boulders, but there wasn't enough boulders to complete the oil rock and we had to go back and run additional rock and segregate more boulders to get enough of the large size rock to make the oil rock product

(Testimony of Harry Hildeburn.)

and we wasted what would ordinarily be road material in order to do that.

Q. I am reading you from Exhibit No. 20, which purports to be, and I think it has been identified as, the diary of Mr. Wood, the engineer on the job, and on page 18 I believe it is here it says, "10-19-37. Completed blading and rolling top course. Contractor decided he would have to wash chips, so told him to wash balance of coarse aggregate too and not to stockpile any more of it on the road until it is washed. 10-20-37. Contractor continued on setting up water plant. Ran oversize rock through the plant to make oil rock. Started to oil but ground was so cold that the oil set up before the rock could be placed on it. Told contractor that we would not oil any more this year. Con- [186] tractor has 160 tons of coarse aggregate piled at 1423 and 350 tons at 1226. Told contractor that we would try penetration oil on October 25 if weather permitted. 10-21-37. Contractor ran oversize reject rock through the plant. Worked two shifts. Mr. Morrison went over the job and discussed specifications of this job and the next section. 10-22-37. Contractor completed running oversize that was stockpiled through the plant and continued washing. 10-23-37. Contractor placed a certain number of gallons of M.C. 1 from Station 1100 to 995. The oil was placed", and so forth. That is immaterial. "10-24-37. Sunday. Contractor blotted oil today and continued washing and stockpiling oil rock. I told him that if he didn't lay off sometime during week that he would have to not

(Testimony of Harry Hildeburn.)

work Saturday. He agreed to do this. Hauled eight loads of rock dust to blot road where oiled. 10-25-37. Contractor started running plant one shift, running pit gravel through to make oil rock. Ran stockpiled material through washer second shift. Material that was made from gravel pit was washed and stockpiled." Now from that date to 11-4-37, "Contractor decided to run about 200 tons extra of one-half inch rock. Will stop his time today and make out his estimate. Ran oversize through plant and made smaller rock out of it. Note: Yesterday's run of 150 tons was taken from U. S. Land and not from the McIntosh property. 11-5-37. Worked on estimate and reports for closing up job. Homer G. Johnson was on job. Started to dismantle plant and move equipment out." [187] Now from these notations refreshing your recollection of the job and the operations of that year, will you be able to testify definitely as to what you were doing between October 23rd and November 5th?

A. Well, I would say we were making oil rock.

Q. Now Mr. Hildeburn, had the rock in the first quarry setup at or near Station 1239 been suitable rock for oil chips, would that final operation between the 23rd of October and November 5th have been necessary at all?

A. It would not.

Q. Mr. Hildeburn, when the crusher roll shafts would break you were foreman on the job at that time when they were breaking in that rock quarry?

A. Yes.

(Testimony of Harry Hildeburn.)

Q. It has been testified there were always on the payroll a plant man, a hoist man, an oiler, feeder and engineer, and that those men were paid for at least three shifts in each instance of a breakdown while the plant was being repaired. In your opinion is that a reasonable estimate of the time involved?

A. Yes—

Mr. Langley: Just a minute.

A. I would think so.

Mr. Langley: We object to that on the ground this is an opinion. Now we are trying to get costs here.

A. Well, I would say yes, that we have employed them and paid [188] those rates.

Mr. Langley: You are making that statement, are you?

A. I will make that statement definitely.

Mr. Lichty: Q. Just give the Court a picture of the labor involved in the taking out of one of those shafts and putting one in.

A. Well, I don't know. It is kind of hard to give a picture of it. But this roll is surrounded by a lot of machinery and the shaft runs through the center of the roll as an axis. The roll turns on it and there is a great deal of dismantling to do to get the old shaft out and then it is so constructed that it is pretty hard to line it up. It is lined up with wedges and one thing and another; not a few wedges but dozens of wedges, to put this shell back on the rolls, and it makes quite an operation to put in a new shaft. It takes—well, with good luck it

(Testimony of Harry Hildeburn.)

could be done in a day, but we very seldom ever did it in a day. Sometimes two days I think it would take us to change that shaft.

Q. What was the necessity for machining or taking it into a machine shop? To have new bearings pressed on, or what?

A. Well, yes, I expect so. I don't recall. I think we had to take it in to have the bearings pressed off of the old shaft. I don't recall having the new ones pressed on, but maybe we did.

Q. But you do remember it had to be taken into the machine shop?

A. Yes, it had to be taken into the machine shop— [189]

Q. To have the old ones pressed off?

A. We had permission from the lumber company to use their shop at McCloud.

Mr. Lichty: You may take the witness.

Cross Examination

By Mr. Langley:

Q. Can you look at the payroll there and tell how much it cost Mr. Johnson to fix this roll shaft in labor? Can you tell from that payroll?

A. No, I don't think so.

Q. It is impossible to tell it, isn't it?

A. Yes. On this payroll I would say it was impossible to tell it, but I have just testified that it took from a day to two days with all our crew.

Q. We are not criticizing your statement on that but what we are trying to get at is the specific cost,

(Testimony of Harry Hildeburn.)

and you can't tell that from the payroll there, can you?

A. On that particular item I don't think you could tell that, no.

Q. Let me ask you this question. While this shaft was being worked on in the shop what were the five or six other men doing?

A. Oh, they were doing something, or else they were laid off.

Q. Yes. A. One of the two.

Q. Sure.

A. They wouldn't be standing around there doing nothing. [190]

Q. So if the payroll shows here there is a laborer a day each on the certain day the roll shaft was broken, that doesn't mean the laborer was actually working on the roll shaft the full eight hours, does it? He might be laying around?

A. Well, I don't know definitely it would mean so, but it is quite likely he was doing something that pertained to the breakage of that roll.

Q. But you can't tell from the payroll, can you?

A. No, you couldn't tell it from this payroll.

Q. And you can't tell from the payroll when you were making oil rock, can you?

A. No, I don't believe you could.

Q. Now Mr. Hildeburn, look on the payroll there, we will say the 25th day.

A. This is in 1938?

Q. October, 1937. I think you had it out there, didn't you?

(Testimony of Harry Hildeburn.)

A. The 25th day? No. It jumped from the 23rd I think to the 30th.

Q. All right. Then take the 30th. You had the 30th?

A. Yes, sir. From the 23rd then it seems to jump to the 30th.

Q. Now I believe you testified you were working in the gravel pit then. I think that is correct. Everybody agrees on that. A. Yes.

Q. Did you use a powder man when you were working in the gravel pit? Did you use any powder man then? [191]

A. No, I think not, as a powder man.

Q. Yes. And what does it say on there on October 30th, 1937? Under that caption it shows powder man eight hours, doesn't it?

A. Well, I find his name. His name was Avelis.

Q. Right up at the top, about the third one down from the top.

A. I guess I am kind of blind. I can't find it.

Q. He is the third name down?

A. The third name down is McAllister, a laborer. This is on October 30th.

Q. Well, I may be looking on the wrong page. Of '37? Have you got '37 or '38?

A. This is 1937.

Mr. Langley: Could I approach the witness, your Honor?

The Court: He doesn't know.

The Witness: Avelis don't show on here at all, the powder man.

(Testimony of Harry Hildeburn.)

(Mr. Langley here approached the witness and indicated to the witness.)

The Witness: That seems to be a different page.

Mr. Langley: Q. It is exactly the same page testified to. He testified that they were exact duplicates.

A. The names are not the same at all.

Q. I know. That is just what I have been talking about.

A. Maybe the one you have is wrong, Mr. Langley.

Q. I know, but he testified they were all true and correct. We [192] have got the original.

The Court: Well, that is what you no doubt have; you say you have; but—

The Witness: Adams. Well, the date seems to be wrong. That is October of—October 23rd all right, but the date on the head of the sheet is wrong.

Mr. Lichty: May I see the sheet? (Paper passed to Mr. Lichty). May I see your sheet that you say is a copy of this one.

The Witness: October 23rd. Something is wrong I just looked at the names. The names seem to match with that date. Well, they do match as a matter of fact, as far as I can tell.

The Court: All right. You can check that later.

Mr. Langley: Q. All right. Mr. Hildeburn, when was it that the first roll shaft broke? About August 3rd, wasn't it, something like that, according to your best recollection?

(Testimony of Harry Hildeburn.)

A. I couldn't say.

Q. Well now, when did you first run into soft rock when you were crushing there?

A. It broke not a great while after we started crushing.

Q. Did you run into it as early as August 12th?

A. I just couldn't testify as to dates at all.

Q. How long have you been employed by Mr. Johnson?

A. Well, I haven't been employed with Mr. Johnson for the last four years but I was employed with him for, I believe for twelve years. [193]

Q. 1936 and '37 you were employed with him, were you? A. Yes, sir.

Q. Were you familiar with the types of equipment that he had? A. Yes.

Q. Well, how many 15-inch by 36-inch jaw crushers did he have? A. Two.

Q. Two. And how many 3-foot cone crushers did he have?

Mr. Lichty: We object to this, your Honor, as not proper cross examination.

The Court: He may answer.

A. Two.

Mr. Langley: Q. And how many 20-inch by 40-inch Pioneer roll crushers?

A. One Pioneer.

Q. Just one Pioneer? A. Yes.

Q. Do you know where that 20-inch by 40-inch Pioneer roll crusher was before it came down on the job there? A. No, I do not.

(Testimony of Harry Hildeburn.)

Q. Where were you before you went on the job down there?

A. I came from some other job but—

Q. Was it a job for Mr. Johnson?

A. It must have been. I was working for him. I just can't say offhand what job it was that I came from. Now possibly that was early in the year, I might not have come from any job, as a matter [194] of fact, because I seldom worked in the winter time and it wasn't often that we had work.

Q. Were you on this job he had up at Chehalis?

A. Yes.

Q. You came from that job down to the job in California; isn't that right.

A. Well, possibly so, but I am not sure about that.

Q. And the equipment that he used on the job there came from this job up in Chehalis, didn't it?

A. No, I don't think so. I don't believe it did. As I recollect, it came from the warehouse, but I wouldn't testify to that because I don't know. But that is my recollection.

Q. Do you know when that job in Washington was finish?

A. No, I don't.

Mr. Langley: That is all, Mr. Hildeburn.

(Witness excused.)

HOMER G. JOHNSON,

the plaintiff, was thereupon recalled as a witness in his own behalf and, having been previously sworn, further testified as follows:

Direct Examination

By Mr. Lichty:

Q. Mr. Johnson, were you down at the job in October and November, 1937, when they were crushing oil rock at the gravel pit? A. Yes. [195]

Q. Approximately how many days were they engaged at that gravel pit in doing nothing but producing oil chips?

A. Well, it was, according to my memory, about three weeks, but in comparing that with Wood's diary, the diary that was Wood's, it says that we started in on the oil rock there on the 22nd of October and we had finished everything on the 4th or 5th of November.

Q. Now you had been preparing, crushing oil rock prior to that?

A. Yes. When we went into this gravel pit we started saving all—instead of saving the coarse rock and grinding it into oil rock, for a little while we started up crushing the road rock and we were not just quite ready for the oil rock. There were screens and we didn't want to try to get so many things going at once and we continued on the road rock while we were working on the screen and while doing that we put these pebbles and oversize rocks in a stockpile; then a little later we got things going. We run oil rock as long as we were running

(Testimony of Homer G. Johnson.)

road rock. When the road rock was finished we went out, got these pebbles, ground them up. Then we got the gravel ground up and had to waste what we had been using for road rock before in order to get oversize out to make oil rock, because oil rock specification would not allow us to make it out of that fine gravel.

Q. So the entire operation in the gravel pit between October 23rd and November 5th was in the production of oil chips?

A. Yes. That was all that was done in the gravel pit, was just [196] to make oil rock.

Q. Now had you been able to produce the oil chips at the first quarry near Station 1239, would you have been compelled to run that extra operation at all?

A. No. There practically wouldn't have been any of that operation from October 22nd on, because all the oil rock we would have needed would have been out when we got out the gravel for the surface—by the time we got out the gravel for the surfacing.

Q. Now have you figured out the extra cost of hauling the oil rock from the gravel pit compared with what the haul would have been from the rock quarry?

A. Yes.

Q. I will hand you this document to refresh your recollection.

A. Yes. This item of \$956.48 was——

Mr. Langley: Now just a minute. I would like

(Testimony of Homer G. Johnson.)

to see the document you are testifying to. If he is going to testify to these things let's have them go in evidence.

The Court: Why don't you put that in? Mr. Langley wants it.

Mr. Lichty: All right. We will put it in gladly (passing paper to Mr. Langley).

Q. That was a copy of the claim you submitted to the Government once on this operation, I believe, was it not? A. Yes.

Mr. Langley: Where did you get the figures that you made this up from? [197]

The Court: Mark it as an exhibit.

(The carbon copy of typewritten instrument headed "Contract #77-D4&E4 Mt. Shasta-Mt. Lassen Highway, summary of extra costs of contract operations due to Quarry Failure at Station 1239", so offered, was marked Plaintiff's Exhibit 31.)

Mr. Langley: Did you prepare that yourself, Mr. Johnson?

Mr. Lichty: What is it now? What is the number of it?

The Reporter: Plaintiff's Exhibit 31.

Mr. Lichty: All right. That has been identified. Now answer his question. Did you prepare that?

A. I didn't. I only assisted in the preparation; not hauling. Why, I checked on that on account of I wanted to be sure that the bookkeeper that had made this up didn't make any error in the hauling,

(Testimony of Homer G. Johnson.)

so I checked that with him at the time this was made out.

Mr. Langley: What did you check it with?

A. We had a chart. In other words, he had the stations where this oil rock was put, and then he made up a chart showing just how it would be, how the cost would be in hauling from the quarry.

Mr. Lichty: I ask to have this chart marked for identification also.

The Court: Mark it. Put the chart in evidence.

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(The chart so offered was thereupon marked Plaintiff's Exhibit 32 for identification.)

Mr. Lichty: The chart is Exhibit 32, is it?

The Reporter: Yes.

Mr. Lichty: Q. Is that the chart you are referring to, Mr. Johnson?

A. Yes, this is the chart.

Mr. Langley: Did you prepare that chart?

A. No, I didn't prepare this. The bookkeeper got it up.

Mr. Langley: I object to it as not properly identified, incompetent, irrelevant and immaterial. If he wants to——

The Court: Admitted.

(The chart so offered and received, having been previously marked for identification, was marked received as Plaintiff's Exhibit 32.)

Mr. Lichty: Q. Did you check it with the bookkeeper? A. Yes, I checked it.

(Testimony of Homer G. Johnson.)

Mr. Langley: What did you check it with?

A. With the engineer's map and specifications.

Mr. Langley: Where is that?

A. It is in here. You have already got it in your exhibits.

Mr. Lichty: It is in evidence.

Mr. Langley: Then you didn't prepare that exhibit? The other [199] one you have got in your hand, you didn't prepare that yourself, did you?

A. I checked this particular item both from this and on this other at the time the bookkeeper made that up.

Mr. Langley: We object to it on the ground it is hearsay, your Honor.

The Court: It is admitted subject to the objection.

Mr. Lichty: Q. Now you took the hauls station by station and show from that chart in that proportion the extra haul occasioned by having to haul it from the gravel pit?

A. Yes. You see, a lot of this oil rock that was used for the armor coat, it was an even spread on it from the great bulk we used on the armor coat, and some kept for maintenance but the great bulk of it was armor coat and spread evenly for about three-quarters of a mile I assume there. This chart shows what it cost hauled from the gravel pit and——

The Court: Talk slower. Mr. Person can't get it, you talk so fast.

(Testimony of Homer G. Johnson.)

The Witness: This chart shows what it would have cost if it had been hauled from both pits.

Mr. Lichty: Go ahead.

A. And the chart also shows what it cost by hauling it all from the gravel pit and the difference.

Q. And the excess cost is how much?

A. The excess cost was \$956.48. [200]

Q. At what rate did you figure the overhaul?

A. I think it was twenty-five or ten cents a yard mile. I would have to look here and see.

Q. Well, let's know for sure.

A. Well, I will have to check that.

The Court: Is he your last witness?

Mr. Lichty: No. One more.

The Court: How many witnesses do you have, Mr. Langley?

Mr. Langley: We have none, your Honor.

The Court: We will be able to finish then during the noon hour, won't we?

Mr. Lichty: I think so.

The Court: Well, it seems reasonable?

Mr. Lichty: It seems reasonable. Yes, your Honor.

The Court: Well then, we will go right through and I will hear your arguments later after I come back. I don't want to try to decide the case today.

The Witness: The haul on the maintenance rock, this chart was made up on the basis of eight cents a yard mile.

Q. Eight cents a yard mile? A. Yes.

(Testimony of Homer G. Johnson.)

Q. Is that the reasonable, customary over-haul——

A. Just a minute. I said yard mile. A ton mile.

Q. Ton mile?

A. Eight cents a ton mile. [201]

Q. Is that the reasonable and ordinary cost of overhaul?

A. Yes. That was about the going price.

Q. Now Mr. Johnson, have you the figures that you prepared on the cost of preparing and opening the substitute quarry near Station 1239?

A. Yes.

Mr. Langley: Did he give us the extra cost on this item?

Mr. Lichty: Yes; \$956.48.

Q. I think you testified, did you not, Mr. Johnson, the extra cost was \$956.48?

A. Yes; yes; sure.

Q. Now what was the cost of preparing, shooting and opening the substitute quarry, and what was the detail on those items? What did they consist of?

A. That extra cost was estimated at \$2490.40.

Q. And what was that estimate based on?

Mr. Langley: Just a minute. We are objecting to this estimate. Now we are trying the issue of costs here.

The Court: Why don't you talk out more directly? If you know what the cost was say so. It was your job.

The Witness: Well, I say——

(Testimony of Homer G. Johnson.)

The Court: There is no use using the word "estimate", if you know.

The Witness: It wasn't my own estimate exactly. In other words, it totaled up here to \$2490.40. [202]

Mr. Lichty: Q. What did the principal items of that cost consist of?

A. Well, at that time, at the time that the old quarry was abandoned, there was rock enough shot up in the thing to have finished the job and to have finished the contract at that end, in other words, or from that quarry, and——

Q. Just answer the question, Mr. Johnson. You don't need to argue your case. I will take care of it later. What are the principal items consisting of that cost? Labor? A. Oh, labor.

Q. Powder, or what?

A. Yes; labor and powder and operation cost, like gas, oil, and fuel and all——

Q. Will you give the amount of the various items in your breakdown of that. How much was the labor cost, how much gas, and oil, and so forth.

The Court: So long as the claim is in evidence, just have him verify it generally, Mr. Lichty. Is this the claim he made to the Government? That is all you need. He doesn't need to relate the items for the record. Mr. Langley has asked to have the claim put in. It is in evidence.

Mr. Lichty: All right. I will ask no further questions on that.

Q. Now Mr. Johnson, you made a claim of

(Testimony of Homer G. Johnson.)

\$660.10 for extra cost due to time lost on account of soft rock. Was that item set forth [203] and itemized in your claim to the Government?

A. Yes, that item was in there. That was not included in the other items.

Q. And was that the actual cost of your delay and labor cost due to the time lost in the soft rock in that quarry?

A. Yes. It was fully a months' delay on the job, and the timekeeper—there was an item put in there for overhead expense, which was extra, and due to the superintendent, the timekeeper, and cars' expense, and miscellaneous.

Q. Mr. Johnson, when you did your work in 1937 you had processed and shaped the roadway and the grade preparatory to putting on the armor coat, had you not?

A. Yes. We processed the whole road and then we put oil, the prime coat on a good share of the road.

Q. Now when you returned in 1938 to complete this project due to the inability to complete it in '37, did you have to reprocess, scarify, loosen up the gravel base and reshape the roadbed again?

A. Yes. They required us to. That prime coat didn't hold through the winter, so that the whole thing had to be rubbed up and rescarified and reshaped again.

Q. Have you figured the extra cost of your reprocessing and reshaping in 1938?

(Testimony of Homer G. Johnson.)

A. Yes. It was \$2870.90.

Q. You actually paid out that much? [204]

A. Yes.

Q. That item was set forth in your claim to the Government? A. Yes.

Q. Now in 1937 did you have your oiling equipment on that job? A. Yes.

Q. What did you do with it during the winter of '37 and '38?

A. Well, the oiling men were there then. They moved up to the other work and so we took down an outfit from here.

Q. Then when you went down in 1938 you had to ship down a complete oiling outfit to replace the one that had been there? A. Yes.

Q. And what was the cost of shipping that oiling equipment to the job in 1938?

A. Well, I haven't got it here in this.

Mr. Lichty: I will ask to have this invoice marked as an exhibit—an invoice and a freight bill.

(The three documents so offered were marked Plaintiff's Exhibits 33, 34 and 35, respectively, for identification.)

Mr. Lichty: May I show these to Mr. Langley? Mr. Langley, I am showing you Exhibits 33, 34 and 35. They are freight bills and express bills.

Q. Mr. Johnson, showing you three documents clipped together and marked Plaintiff's Exhibits 33, 34 and 35, I will ask you what those are. What are those, Mr. Johnson? [205]

(Testimony of Homer G. Johnson.)

A. Well, these are freight bills on that oiling equipment.

Q. That had to be taken to the job in 1938?

A. Yes, sir.

Q. And what is the total of them?

A. \$232 and \$255.

Q. Two fifty-five-0-two? A. 0-two.

Q. Making \$487.02? A. Yes.

Q. You paid?

A. Freight on that. That was freight one way, and then back.

Q. You paid those bills? A. Yes.

Q. And it would not have been necessary had you been able to complete the job in 1937?

A. No. If we had got done here before the other left the other oiling outfit would have done it before they left the job.

Mr. Lichty: I offer these in evidence.

(The Uniform Straight Bill of Lading issued by McCloud River Railroad Company to Homer G. Johnson, so offered, was received in evidence and, having been previously marked for identification, was marked received as Plaintiff's Exhibit 33; arrival notice of McCloud River Railroad Company to [206] Homer G. Johnson, so offered, was received in evidence and, having previously marked for identification, was further marked received as Plaintiff's Exhibit 34; and Receipt for Freight Delivered on form issued by Southern Pacific Company to Homer

(Testimony of Homer G. Johnson.)

G. Johnson, so offered, was received in evidence and, having been previously marked for identification, was further marked received as Plaintiff's Exhibit 35.)

Q. Now Mr. Johnson, in the final estimate of the Government a penalty was imposed on you for late completion in the sum of \$1575.00, was it not?

A. Yes.

Q. That was deducted from the money that you received on this contract?

A. Yes.

Q. Mr. Johnson, had the quarry at Station 1239 been a good commercial quarry of sound hard rock, would you, with your plant and equipment and your plan of operation, have been able to complete the entire job before the cold weather and rains of 1937?

A. Yes. We would have completed the job in its entirety.

Mr. Lichty: You may take the witness. [207]

Cross Examination

By Mr. Langley:

Q. Mr. Johnson, I want you to answer this question "Yes" or "No". All these figures that you have prepared you prepared from this payroll that is in evidence; is that correct?

A. You mean all of them, you say? Your question was "All of them"?

Q. Yes.

A. Well, when this here was just prepared here, this sheet I have here, I mean this one that was originally filed with the Bureau of Public Roads,

(Testimony of Homer G. Johnson.)

that was prepared by the cost records and payrolls, yes.

Q. Where are your cost records?

A. We haven't been able to locate our cost distribution which we had on the job and a few times had been taken around and put back in the files, looking forward to the final day of reckoning in this thing, and they have been misplaced somewhere. I have hunted high and low for them but I haven't been able to find the actual cost distribution kept on the job.

Q. Who kept the actual cost distribution on the job?

A. The bookkeeper.

Q. What bookkeeper?

A. Murphy.

Q. Where is Murphy now?

A. He is dead

[208]

Q. Isn't it a fact Murphy was timekeeper and not bookkeeper?

A. Well, it all depends on the job. You generally refer to bookkeeper when you have only one man on the job. He was bookkeeper or timekeeper, whatever you want to call him.

Q. What was Murphy on this job, timekeeper or bookkeeper?

A. He was in charge of doing both types of work down there on the job.

Q. How did you pay him, as timekeeper or bookkeeper?

A. Paid him the same thing, regardless of what it was.

(Testimony of Homer G. Johnson.)

Q. Tell me how you paid him, as timekeeper or bookkeeper.

A. I don't know as we made any particular designation.

Mr. Langley: Well, show the witness the payroll, will you, Mr. Cozad.

Q. Now look at that, Mr. Johnson, and tell us whether you paid Mr. Murphy as a timekeeper or bookkeeper.

A. Well, I don't know if this would exactly signify anything on account of having specified what the man was classed.

Mr. Lichty: Just look at it and see if you can specify what it says there. That is what he wants to know.

The Court: Do you know what it says?

Mr. Langley: Sure. He had him as the timekeeper.

The Court: All right.

The Witness: It shows timekeeper.

Q. You know as well as anything, Mr. Johnson, that Mr. Murphy didn't know anything about cost records, don't you? [209] A. What is that?

Q. Mr. Murphy didn't know anything about keeping cost segregation records, did he?

A. Well, he is the one that kept them.

Q. What did he keep? Did you ever see them?

A. Ever see what?

Q. The cost distribution records. A. Yes.

Q. Well, tell us what they looked like. What did they have on them?

(Testimony of Homer G. Johnson.)

A. Well, everybody, every man every week was divided into the various work that he had done.

Q. Yes. How was he tied in?

A. And the bills were divided that way, too, every month, by the classing of the various operations on the job, various departments of the job.

Q. This payroll you have got here doesn't show any cost distribution, does it?

A. Well, it is just payroll. In other words, anyone familiar with the organization down there could tell from the payroll here by a little figuring what the men were doing, because the men would be doing what they were shown for on the payroll—what they were hired for.

Q. Were you there all of the time?

A. Practically all the time, yes; a great portion of the time. [210]

Q. All right. Tell us, then, what was the powder man doing in the gravel pit.

A. There was a lot of logs and stumps and one thing and another to take out of there and he had to shoot a lot of stumps out of there, and various things.

Q. On October 30th?

A. Yes, on October 30th probably.

Q. Now as I understand your testimony, Mr. Johnson, you said it cost you \$956.48 extra cost for hauling oil rock; is that correct? A. Yes.

Q. Tell us how you found that off of the payroll.

A. We didn't take that off the payroll.

Q. Where did you get that?

(Testimony of Homer G. Johnson.)

A. Took it from the records. In other words, the locations on the engineer's chart, or the engineer's blueprint on the job, called for 220 yards to the mile and they put it on in that way at 220 yards to the mile, and there were sixteen and some tenths miles there and those quarries and gravel pits were located within certain stations there, within a few feet of certain stations, and you could sit down and figure it out yourself.

Q. You could, huh? You must be a genius. Tell us how you figured it out off of that payroll. That is what I am asking you.

A. We didn't use the payroll. We had the chart to go by.

Q. You had to have some man to do the work, didn't you? A. How is that? [211]

Q. To do this work? A. Yes; Murphy.

Q. Yes.

A. Yes. Murphy made up that chart and made it out there.

Q. In other words, Murphy made up that yellow chart; is that right?

A. Yes, sir. And I checked it before this claim was sent in and have rechecked it since and know it is correct.

Q. That chart doesn't show any men on it, does it?

Mr. Lichty: He is not claiming for men; he is claiming so much yards a mile, whether one man or more.

(Testimony of Homer G. Johnson.)

Mr. Langley: You have to have some men to spread it on.

The Witness: It don't make any difference about that. It was based on eight cents an extra ton mile to haul it, and that was the price for the extra work.

Q. What was the sub-contract price?

A. Well, it was about that.

Q. Sure. You had a sub-contract, didn't you?
"Yes" or "No".

A. Well, the hauling man was working by the yard mile, in other words.

Q. A sub-contractor, wasn't he?

A. Well, I don't know whether you would call it a sub-contract; piece work more or less, I suppose. I think they make a distinction between a sub-contract and piece work.

Q. Let me ask you this, Mr. Johnson: In that estimate you submitted [212] to the Government why did you estimate 220 tons per mile when 320.10 tons were used on the road?

A. Well, there might have been a little discrepancy there but it would be so small an amount that it was immaterial. The plans originally called for the 220 yards per mile and the job was carried out as near that—as near according to the plan as possible. There might have been a few discrepancies one way or the other.

Q. Is that the only discrepancy in your figures?

A. What is that? What was the question? You talk too fast.

Q. Is that the only discrepancy in your figures?

(Testimony of Homer G. Johnson.)

A. Well, that is all that I know of. I don't know as there was a discrepancy there.

Q. What about the—let me ask you this question: Why did you estimate 333 tons in the stockpile at Stations 1534, 1255 and 1086 when only 159.48 tons were there?

Mr. Lichty: I object, your Honor, on the ground there is no evidence in the record as to how many tons were there. When he says only a certain number of tons were there he should have some evidence to substantiate it.

Mr. Langley: It shows on our screening record we had here in evidence.

Q. Now in this claim for superintendence you claim \$660.10, as I understand it. The superintendent and timekeeper you are charging that up to had other duties than the specific duties you are

[213]

claiming for here, didn't they?

A. Well, if we had got done when we should have got done, if this quarry hadn't been a failure we would have been done months earlier and we would have saved that much money for timekeeper and bookkeeper—I mean the timekeeper, superintendent, and cars, and so forth, would have been eliminated or transferred to some other work.

Q. Let me ask you this question, then: Why did you claim \$150.00 a month for the timekeeper when you were paying him only \$30.00 a week?

A. Well, the timekeeper got his board paid besides.

(Testimony of Homer G. Johnson.)

Q. Why did you assume a full month's time of operation of the so-called second quarry when it only lasted two weeks from September 6th to September 18th?

A. Well, we broke four roll shafts there in the other and Wood's directory there shows, or diary, rather, shows sometimes there three days we were broke down from the time we broke down until we got fixed up again.

Q. Mr. Johnson, how many 20-inch by 40-inch Pioneer roll crushers have you?

A. I have got one Pioneer roll crusher.

Q. How many did you have in 1936 and '37?

A. I had one Pioneer roll crusher.

Q. Where was that in the summer, in June, 1937?

A. Well, I don't know exactly now just about the equipment. We [214] have got about two sets of outfits. We have got three sets of rolls.

Q. I am talking about this 20-inch by 40-inch Pioneer roll crusher. You said in your affidavit it was in Portland. Is that where it was?

A. That is my remembrance, that it was here in Portland. Practically all of this equipment was. Now I am not sure about any particular piece.

Q. You want to say that that 20-inch by 40-inch Pioneer roll was not being used on the Morton-Kosmos job near Chehalis in 1937?

A. Well, I am not sure about that. We had a Universal up there; we had a Cone; and I changed some of the machines up there. I have forgot just

(Testimony of Homer G. Johnson.)

what was actually used there and what wasn't. I know there was—you see, we had one outfit in one setup, then we made another setup and then put in a different outfit and brought the other stuff here in to Portland. I don't remember now just what change was made there.

Q. You don't want to answer the question "Yes" or "No", then, I take it?

A. Well, I don't remember definitely about that.

Q. Uh huh. You understand you made a statement under oath, an affidavit, it was in Portland? You understand that, don't you?

A. As I remember, yes. I think that is the way I made the statement. As I remember, it was in Portland.

Q. What do you want to say about it now? [215]

A. Well, I think the same thing.

Q. When did you finish that job up there in Chehalis? What was the date?

A. Oh, it was sometime in the later days of July.

Q. July 17th, 1937? That is correct, isn't it?

A. Oh, I could not tell you because I would have to go back and look at some records.

Q. That 20-inch by 40-inch Pioneer roll crusher was up there on that job, wasn't it?

A. Well, I don't—as I told you, I think that Pioneer roll crusher was here. I think the Universal I was finishing up with was up there.

Q. Do you know J. P. Adams? He is an employee of yours, isn't he? You know J. P. Adams?

A. Yes. I don't know where he is.

(Testimony of Homer G. Johnson.)

Q. He is a crusher man, isn't he?

A. Yes. He worked for me.

Q. He was working on the job for you up there at Chehalis, wasn't he?

A. Yes, he worked up there.

Q. He came from that job immediately down to the job in California, didn't he?

A. Yes, he went down there.

Q. Got on the job down there about July 21st; is that correct?

A. I couldn't tell you when he did get down.

[216]

Q. Well, that would show on the payroll, wouldn't it?

A. Well, I can't tell you offhand.

Q. How about foremen Breed and Meyers—the same situation there? They came from the Chehalis job down to the job in California, didn't they?

A. Well, Meyers did. Breed was here in town and he went down there with Hildeburn.

Q. And the fact is, the reason you didn't get started down there on time is because you didn't finish this job in Chehalis, wasn't it?

A. That didn't have nothing to do with it. In other words, there was two outfits of crushing equipment and two different superintendents and it was a case of getting crews and organizing.

Q. Well, you said this man—what was that?—Meyers was here in town; why didn't you get him down there before the 21st of July?

(Testimony of Homer G. Johnson.)

A. No. I said Breed was down there.

Q. Breed. Yes.

A. Well, possibly he wasn't ready for him.

Q. Sure. Did the increase in the payroll at the Mt. Shasta job of from twelve employees on June 17th to twenty-eight in the week of June 24th result in any way from the completion of the Chehalis job?

A. I didn't get the question?

Q. Did the increase in the payrolls on the Mt. Shasta job from twelve employees in the week of July 17th to the 28th result in [217] any way from the completion of the Chehalis job?

A. Well, I suppose that those, some of those men that we could transfer, why, when they got through over there, they had been out quite a while, why, they moved down there.

Q. On this map you have introduced here to show increased cost on the overhaul, what station is approximately the center of the 16.16 miles?

Mr. Lichty: What station would be the center of the sixteen miles of road, you mean?

The Witness: I would have to sit down here and figure that out.

Mr. Langley: I thought you had the map there.

The Witness: Well, it doesn't show that particular question you have asked. The map shows it there in a chart. In other words, every yard mile shows what it would cost from each one of those setups.

Q. Yes. And your estimate shows costs. Where did your estimate begin to show cost, in the middle

(Testimony of Homer G. Johnson.)

of the 16.16 miles, or did you show it from the beginning of the gravel pit?

A. Well, it shows what the cost would have been for hauling it all from the gravel pit; then it shows what the cost would have been for hauling it from each one of the other places, assuming it was divided there in the center, and the difference between the two was what it cost extra. It wouldn't particularly mean a great deal of difference even if it didn't split right on the exact [218] station where the center came. In other words, the stuff could be spread from the beginning of a mile out, so if it had to be material there as to just how—where you would exactly—where you would really split the thing—whether you split it on the exact station or not would make little difference.

Q. In your claim for moving over to the so-called second quarry, why did you charge 21½ hours for shovel operation September 18, 1937, when the crushing plant was shut down and all the crushing was completed at the original quarry before the full shift was completed. In other words, you only worked eight hours, and yet you charge 21½ hours. Now look at the payroll and explain that.

A. I didn't get that question. You talked so fast I didn't get it.

Q. All right. Find September 18th, 1937, on your payroll.

A. All right. Now what is your question? I have my payroll open here for September 18th.

(Testimony of Homer G. Johnson.)

Q. I want to know why you charged 21½ hours for the shovel operators on that day.

A. Well, those three different operators there on the other job jibes with 21½ hours, so the shovel must have been used 21½ hours.

Q. In other words, your payroll doesn't show it? You say it must. You are just guessing at it, aren't you? (Pause) Oh, well—

(Witness examining papers.)

The Court: Take your time to figure it out. Do you know what he is trying to figure out? [219]

Mr. Lichty: I haven't any idea.

The Witness: He wants to know why the discrepancy on this bill that was put in for this extra amount of shovel time on September 18th, which is shown as 21½ hours, while he says the operators—the bill shows the operators' time put in for that day don't explain that amount, and he says it is not on the payroll, there is not that much time for the operation shown on the payroll, and I am trying to check—

The Court: Well, that is a matter of argument.

Mr. Langley: All right. O.K. We will go on. I will ask you an easy one.

Q. Look on your payroll there on September 12th and tell us why you didn't make any charge for September 12th, if you can.

A. On September 12th?

Q. Yes. A. Was it Sunday?

Q. Well, that is up to you to find out.

The Court: Oh, he doesn't know. Does that say

(Testimony of Homer G. Johnson.)

Sunday, Monday or Tuesday? We don't have a calendar for five years back.

Mr. Langley: All right.

Q. Can you tell from your payrolls how many men continued to work at the original face in the quarry in getting rock to the crusher when you moved over to the second face?

A. Yes; all of these men. In other words, the shovel runners were all taken over there, all worked over there. The powder man and [220] his helper, and the air compressor.

Q. Are you testifying from your recollection, or are you getting those off of that payroll?

A. Well, practically both.

Q. Yes. You can't find it on the payroll, can you?

A. Yes, I can find them. I can pick them out.

Q. Show us how you do it.

A. Well, if you want to take the time for it—

Mr. Lichty: Here is Mr. Wood's diary on that date: "9-12-37. Sunday. Started plant at 3:00 P.M. after 24 hours closedown for Sunday."

Mr. Langley: Q. The point I am getting at, Mr. Johnson, is, you can't show any cost segregation from that payroll, can you?

A. Yes. In other words, if I take a little time for it here I can pick them out because I know who was working and what they are employed for.

Q. But you are doing it from your independent recollection, then, not from the payroll, are you?

A. These costs here (indicating)? Well, they

(Testimony of Homer G. Johnson.)

were taken from the distribution originally, and the distribution was certified, and the payroll corresponds exactly to what the original did, and the distribution sheets, as I testified a little bit ago, we placed some of this stuff in different places to have it ready for a final reckoning day and some of it got lost in six or seven years. That is why I haven't got it. [221]

Q. When did you lose it?

A. I don't know when we lost it. We just misplaced it. We have got all the records out there and we misplaced it some place and can't locate it.

Q. You knew you were going to have a claim against the Government?

A. Yes; certainly I knew it before.

Q. Certainly. You knew you would have to have these cost records in order to establish your claim, didn't you?

A. Sure.

Q. Why, certainly.

A. They were easy to pick out there. In other words, it was on the payroll. It was just moving over in the other quarry because we hadn't enough material in the old quarry to have finished up with. But the original cost distribution, in other words, if you showed all of that and exactly what the thing was, and this thing was based upon that, but just where that is at now, we have hunted high and low here since this thing came up here last—

The Court: You don't need to keep saying that over and over. Ask him another question.

Mr. Langley: Q. Well now, Mr. Johnson, you

(Testimony of Homer G. Johnson.)

say your side of the case is that the quarry was condemned on September 4th. Isn't that correct?

A. Well, we put off a shot there the latter days of August and there wasn't much good, and we picked a little bit out of it and Wood would not take it at all any more. [222]

Q. Now then, answer the question. Wasn't it about September 4th that you claim the quarry was condemned?

A. Well, I hadn't claimed a definite date in there, I don't think. It was approximately in the latter part of August. Wood's diary—

Q. Well then, explain—

A. Wood's diary shows that better than I would remember.

Q. Yes. Your payroll record shows that somebody, I don't know who it was, was working over there in the first place on September 12th, and yet you are coming in here claiming the quarry was condemned on September 4th. Now how do you account for that in your extra costs?

A. How is that question again?

Q. You say the face number one, or the first quarry, was condemned on September 4th. I think that is the correct date. Yet in your claim you are showing operation in the first face on September 12th. Now how do you account for working in the first face if it was condemned on September 4th?

A. Well, the bill shows here cost of moving it to substitute quarry on September 6th. That jibed, as I remember checking that here, with Wood's

(Testimony of Homer G. Johnson.)

directory, or diary. That checks approximately with it.

Q. But you were working over there in the first face on September 12th after it had been condemned; isn't that correct? A. What is that?

Q. You were working over there in the first face on September 12th [223] after you claim the quarry was condemned, it wasn't any good?

A. Oh, the first face, yes. We went back there and picked up a little stuff. Assume that this room was the quarry and there was a little, after it was condemned, entirely practical. There was one corner, say, about like one of these panels here we got a little bit of stuff out of. We ran a few hours after that up there on a shot in another place.

Q. How many tons did you get around there then?

A. Oh, I don't know. We picked around there and got a little stuff.

Q. How many tons would you estimate?

A. It would be hard to recollect that in my mind.

Q. From the screening record, and so forth, you got 3500 tons. A. Out of the old quarry?

Q. Out of the old quarry.

A. Oh, that would be an error, because we only worked in there a small amount.

Mr. Lichty: Mr. Johnson, you put all of your material from the new face, as they call it, through the crusher at that old quarry, didn't you?

A. Yes, sir. In other words, the rock from the new face we found we hauled up to the plant. We

(Testimony of Homer G. Johnson.)

never hauled the plant to the new site. The plant was at the old site all the time. But as far as taking any stuff out of the old quarry after we moved over into the other quarry, it was only just a few hours run a time [224] or two there.

Mr. Langley: Q. Did you make a charge on September 12th for operating in face number two? Look on your payroll there. You have got it there.

A. No, there is no charge made on September 12th.

Q. On September 12th?

A. That is apparently Sunday, September 12th. I guess nobody was working that day.

Q. Well, can't you tell from your payroll whether you were working or weren't working?

A. Well, there was a little work going on there on Sunday but not very much.

Q. What does your payroll say about it?

A. Well, the payroll shows some work going on there; not anywheres near a full crew, just a few men.

Q. Well, now then, you have got a few men working on September 12th. How do you tell by the payroll whether they are working in face number two or face number one?

A. Well, I can't tell from this operation here—I mean from this record here.

Mr. Langley: No. That is all.

Mr. Lichty: That is all. Oh, there is one thing more I want to put in. Well, no; that will be a matter of argument.

Mr. Langley: Just step down, Mr. Johnson.

(Witness excused.) [225]

Mr. Lichty: Now your Honor, on the two items that we have proved here that were not in the original claim in the complaint, the cost of the crusher rolls and the repairs to the crusher, in the amount of \$1029.63, and the cost of shipping oiling equipment in 1938, totaling \$487.02, I am going to ask to amend the complaint to conform to the proof and will within the next twenty-four hours file an amended complaint on those two items.

The Court: It may be filed and the original answer may stand as an answer to the amended complaint.

Mr. Langley: Is that all?

Mr. Lichty: That is all.

Mr. Langley: The only thing that I have, your Honor, is specifications for the State of California and the State of Washington, and the purpose of introducing them in evidence, if your Honor cares to have them, is to show that in the contracting practice a person must go at least 500 feet change of site; that is, this goes to his claim that he is entitled to increased cost for moving from face number one to face number two. These specifications show a minimum distance within which a contractor moves before he is compensated is 500 feet.

The Court: I have already held against you on that issue. That was the issue before.

Mr. Lichty: Yes. That is an issue, not of damages; that is an issue of the right to damages—breach of contract.

The Court: So when I get back you have your findings of fact [226] prepared, Mr. Lichty, to serve on Mr. Langley.

Mr. Lichty: Yes, I will.

The Court: You will no doubt have objections and I will hear you both in argument on everything.

Mr. Lichty: All right. Thank you, your Honor.

Mr. Langley: Well, these findings, if your Honor please, are the findings on the amount of damages?

Mr. Lichty: On the amount of damage. That is the only thing left.

Mr. Langley: Let me ask you one more question. There has not been any pre-trial order prepared of this second part. It doesn't make any difference to me.

Mr. Lichty: The exhibits are in now. It doesn't make any difference whether there is a pre-trial order. It was merely the introduction and identification of the original exhibits.

The Court: The original pre-trial stated that this part of the case would follow later.

Mr. Lichty: Yes.

The Court: Tomorrow morning.

(Thereupon Court was adjourned at 12:33 o'clock P. M.) [227]

Tuesday, August 1, 1944, at 10:45 o'clock A. M., Court convened in Chambers, Mr. John Lichty, Attorney for Plaintiff, and Mr. William Langley, Assistant United States Attorney, in behalf of Defendant being present, the following proceedings were had herein:

The Court: All right.

Mr. Langley: Your Honor, here is the question I had in mind. Mr. Lichty has filed an amended complaint. The body of the amended complaint lays claims totaling about \$15,000.00, and the prayer prays for \$10,000.00. Now under the Tucker Act the jurisdiction of the District Court is limited to claims totaling \$10,000, so I feel as though I will have to object to the filing of this amended complaint on the ground that the Court does not have jurisdiction to consider claims in excess of \$10,000.00.

Mr. Lichty: Didn't the original complaint claim over ten thousand, too?

Mr. Langley: I don't think so. But, anyway, if your Honor accepts the filing of this amended complaint, then I would like to have the Pre-Trial Order changed so that it raises my objections to the jurisdiction of the Court. The Court does not have jurisdiction to entertain the action because the claims amount to more than \$10,000.00 and it becomes more important in the findings of fact because the findings of fact also make you find a total liability in the amount of \$15,000.00, approximately [228] \$15,000.00, but only allow a recovery in the

amount of \$10,000.00. Now of course I know Mr. Lichty is never going to take any advantage of the extra \$5,000.00, but suppose something happens to him and somebody inherits this case, they might go to Congress and get an extra appropriation for the extra \$5,000.00. So we are in the position where we will have to call that to the attention of the Court.

Mr. Lichty: We provide in the findings the plaintiff has waived damages in the excess of \$10,000.00. I think that fully covers that.

Mr. Langley: Of course, I don't see the point. If you are going to limit the recovery to \$10,000.00, why raise any question? Why not have the body of the complaint and the findings claim \$10,000.00? Anyway, all I am doing is objecting. In behalf of the Government I am objecting to the finding in excess of \$10,000.00 and asking that the case be dismissed on the ground the Court hasn't jurisdiction, because the amounts in the complaint—in the amended complaint, are more than \$10,000.00.

Mr. Lichty: I wish to make this statement: That the original complaint on file sets forth claims totaling more than \$10,000.00, where the prayer of the complaint was limited to \$10,000.00—to \$9,999.99; that no objection to the jurisdiction has ever been made until now; that at the time the amendment to the complaint was orally made before the Court there was no objection to the amendment; that there is no attempt made, either in the original [229] complaint or in the amended complaint, to secure a judgment against the Government of more than \$10,000.00 for the breach of this contract; that the

findings clearly set forth that the plaintiff has waived any damages that it might have from the Government in excess of the \$10,000.00, and that within the Tucker Act we are not seeking to recover more than the jurisdictional limit of this Court.

Mr. Langley: Well, the only thing I have to say in reply to that is, at the time the amendment was proposed I agreed to it on the ground it would not be put in the alternative and Mr. Lichty promised it would not be. Now maybe those words of mine were misused. What I meant by the alternative was that the Court would not have to choose, where he could choose \$2,000.00 here and \$2,000.00 there, but he makes it in the alternative where the Court has to choose \$5,000.00 here, \$2,000.00 there, and so on, up to the ten thousand which he could choose if he wanted to but didn't have to choose.

The Court: You can put yourself at ease about what your position may have been previously, so long as it satisfies your own conscience, Mr. Langley. You need have no further concern, because it is my duty, under all the decisions, to examine, upon my own initiative, any jurisdictional questions raised at any time before us. What I am interested in is not what you may have said or thought at the time—.

Mr. Langley: Yes, I appreciate that. [230]

The Court: —but what I am interested in is what the Tucker Act means.

Mr. Lichty: Let's get the Act.

The Court: Does it mean that no claim may be made against the Government for more than \$10,-

000.00, even though judgment for \$10,000.00 only is asked and entered? I wouldn't think it would mean that. Surely it has been construed. I have had a number of Tucker Act cases but I have never had one where this point was involved. They are usually claims for tax refund and the amount is less than \$10,000.00.

Mr. Langley: Well, what I don't understand is, what is the point? What is counsel's point in it? If he only wants \$10,000.00 damages why is he putting in the full fifteen thousand?

Mr. Lichty: You know why, of course.

Mr. Langley: Honestly I don't.

Mr. Lichty: The reason is this: That we are presenting to the Court several items of damages. That record I understand you intend to appeal to the Circuit Court of Appeals. If either this Court or the Circuit Court of Appeals can find that there is any damage proved that will sustain a judgment for \$10,000.00. I think we are entitled to present it to the Court, and as long as we are waiving any damages in excess of \$10,000.00 we are certainly not claiming from the Government in this action more than \$10,000.00.

The Court: It is usually dangerous for a man to try to state [231] another man's position for him, but what I understand Mr. Lichty to maintain is that under the Tucker Act the *constrctor*, so it was in this case, can say, "I was damaged in a number of different ways, \$5,000.00 here, \$2,000.00 there, etc., the aggregate of which is considerably

more than \$10,000.00", and ask the Court to sustain him as to specific items totaling not more than \$10,000.00. Is that the way your findings are drawn?

Mr. Lichty: That is the way the findings are drawn.

The Court: What do they disclose?

Mr. Lichty: Approximately fourteen thousand five hundred—between fourteen and fifteen thousand.

Mr. Langley: Just a few dollars under \$15,000.00, the way I figured it.

Mr. Lichty: That is right.

Mr. Langley: This is Section 41, subdivision 20, Title 18, the popular name of which is the Tucker Act. It says "Concurrent with the Court"—

Mr. Lichty: Isn't it Title 28?

Mr. Langley: Excuse me; it is 28. "Concurrent with the Court of Claims, of all claims not exceeding \$10,000.00 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the parties would be entitled [232] to redress against the United States", and so forth. Now I did the best I could to check this particular problem that we have and I didn't find any cases construing it.

Mr. Lichty: Let me see it, please. (Mr. Lichty examined the statute.) I frankly have never con-

sidered the matter. When the question came up it seemed to me that within the meaning of that, that any time your complaint does not pray for damages against the United States for more than \$10,000.00, when you are willing to waive any damages in excess of that to come within the meaning of the claim not exceeding \$10,000.00, it was proper. If, as counsel says, he has found nothing construing that, and if after search I can find nothing construing it, I would be willing to stand on my feeling of the construction that when you are not asking for over \$10,000.00 you are bringing yourself within the jurisdiction of the District Court.

The Court: I wonder if I understand Mr. Langley's point correctly in its practical aspects. Are you saying that I should find specially only on items totaling not to exceed \$10,000.00?

Mr. Langley: That is my opinion. When the law says if the amount of claims is limited to ten thousand, I should think you only have jurisdiction to make a finding of liability up to ten thousand.

The Court: According to your point of view, Mr. Lichty—

(The Court was here interrupted to answer a telephone call.) [233]

The Court: You show I was interrupted there on the telephone, to explain that break. Under the general doctrine against splitting causes of action I would not think that a man could sue for damages under a contract, under the Tucker Act, claiming

less than \$10,000.00 and ever make any other claim in any other tribunal for further damages growing out of that contract. But I am persuaded to stop, look and listen when you say that a finding of damages totaling more than \$10,000.00 might defeat jurisdiction, even though the judgment was less. Your point is technical, but lots of things are technical about law, and particularly the Federal statutes. Maybe you are not prepared right now to ask me to act finally, Mr. Lichty?

Mr. Lichty: No. Since the point has been raised I would like to look into it to see whether there is merit to it.

The Court: All right.

Mr. Lichty: And bring to your attention anything I can find.

The Court: All right. Then do the rest the way you find satisfactory, over the telephone, if you like. I want to save you further trips up here.

Mr. Lichty: All right.

The Court: You call Mr. Langley on the phone and tell him what your final conclusions are, and then you call me and tell me. I will be here every morning this week, and then later I am not sure.

Mr. Langley: Then you understand my position? I would like [234] to amend the Pre-Trial Order then accordingly, if it goes against me, so as raise the point. I mean, suppose the amended complaint goes back to the beginning of the action, then the Pre-Trial Order is supposed to supersede all proceedings; so even if this amended complaint is filed the Pre-Trial Order has to be amended to corre-

spond to the amended complaint, to make it good in this case. If they are going to amend the Pre-Trial Order I would like to set up my position in the Pre-Trial Order about the jurisdictional question.

Then there is a motion in the case, supported by affidavit, that this case should be postponed pending the return of this resident engineer from the South Pacific, and this motion has never been ruled upon, and I suggest that something be placed in the findings making a finding that the Government is not prejudiced by the failure of this witness to be here, or wording to that effect.

Mr. Lichty: I don't think it is necessary for the Court to find whether they are prejudiced or not. I think that the Court merely would have to find that the case should not be postponed for the absence of the witness.

Mr. Langley: Is this agreeable, Mr. Lichty? I want something in the record to show that our motion has been ruled upon.

The Court: Well, the fact is we went ahead and tried the case. Whether I said so or not, what was in my mind was that I was reserving decision until I heard what the parties had to offer. If [235] I had had the feeling at the end of the case that the Government was prejudiced through the non-appearance of the witness, and that he should be heard before I decided the case, I would have said so, and, if I didn't say so in the record, that was my feeling. I decided the case on the basis that noth-

ing disclosed in the case made me feel that the fact this witness was not available for the Government at this time and that we went ahead without him did not substantially prejudice the Government.

Mr. Langley: Very well.

The Court: That will make your record on that.

Mr. Langley: I would like to have it in the findings.

The Court: No, no. I won't put it in the findings, because that does not accord with the established practice, but what I have just said here gives you all you need to make your record.

Mr. Langley: It is raised as an issue in our pre-trial order.

Mr. Lichty: It does not raise any issue of fact. It does not belong in any finding of fact.

(Thereupon, at 11:10 o'clock A. M., the foregoing hearing was concluded.)

[Endorsed]: Filed March 26, 1945.

[Title of District Court and Cause.]

Reporter's Certificate

I, Alva W. Person, hereby certify that on Tuesday, April 18, Tuesday, June 13 and Tuesday, August 1, 1944, I reported in shorthand all of the evidence given and oral proceedings had in the above entitled cause before the above entitled Court, the Honorable Claude McColloch, Judge presiding; that

I thereafter caused my shorthand notes to be reduced to typewriting, and the foregoing and hereto attached transcript, consisting of 236 pages, numbered 1 to 236, both inclusive, constitutes a full, true and accurate record of all of the evidence given, objections made, rulings thereon and exceptions taken thereto, and all other oral proceedings had upon said dates upon the trial of said cause.

Dated at Portland, Oregon, this 20th day of November, A.D. 1944

ALVA W. PERSON,
Court Reporter.

[Endorsed]: No. 11026. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Homer G. Johnson, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 3, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11026

UNITED STATES OF AMERICA,

Appellant,

v.

HOMER G. JOHNSON,

Appellee.

DESIGNATION OF RECORD

Appellant respectfully designates for printing the whole record as particularly itemized in appellant's Designation of Record to the District Court to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, it being the appellant's intention to designate the whole record, namely:

1. Complaint
2. Amended Complaint
3. Answer of Defendant
4. Pre-Trial Order
5. Memo of Decision
6. Findings of Fact and Conclusions of Law
7. Motion
8. Order
9. Judgment
10. Transcript of Pre-Trial Proceedings
11. Transcript of Trial Proceedings
12. Notice of Appeal

13. Designation of Record

14. Points to be Urged by Defendant.

CARL C. DONAUGH

United States Attorney for the District of Oregon

MASON DILLARD

Assistant United States
Attorney.

United States of America

District of Oregon—ss.

Service of the within Designation of Record is accepted in the State and District of Oregon this 30th day of April, 1945, by receiving a copy thereof duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

JOHN LICHTY

Attorney for Appellee

[Endorsed]: Filed May 2, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant respectfully submits the following statement of points upon which appellant intends to rely on appeal:

I.

The district court erred in holding that it retained jurisdiction under the Tucker Act (Act of March 3, 1887, as amended, Judicial Code, Section 24 (20),

Title 28 U.S.C. Section 41 (20) after the complaint was amended during trial to present claims exceeding \$10,000.00.

II.

The district court erred in holding that the claims presented in the amended complaint did not exceed \$10,000.00 within the meaning of the Tucker Act.

III.

The district court erred in holding that a complaint containing interchangeable, alternative claims exceeding \$10,000.00 in the aggregate is brought within the limitations on the jurisdiction of district courts under the Tucker Act by waiver of judgment in excess of \$10,000.00.

IV.

The district court erred in holding that the Tucker Act jurisdictional limitations could be circumvented by permitting amendment of the complaint for the stated purpose of assuring judgment in the amount of the jurisdictional maximum even if some items of claim allowed by the district court were disallowed on appeal.

V.

The district court erred in holding that paragraph 2-2 of the specifications attached to the contract would reasonably induce the belief that the rock obtainable from the source to the right of Station 1239 would be adequate in quantity and suitable in quality for the purpose intended.

VI.

The district court erred in construing said paragraph 2-2 as constituting a representation or warranty that the rock obtainable from the source to the right of Station 1239 would be adequate in quantity and suitable in quality for the purpose intended.

VII.

The district court erred in not holding that said paragraph 2-2, read in its entirety, expressly as well as by clear implication negatived any representation and prevented reasonable reliance on the first sentence therein as a representation or warranty that an adequate supply of suitable rock was obtainable from the source to the right of Station 1239.

VIII.

The district court erred in not holding that the manifest purpose of said paragraph 2-2, to prevent unsightly scars visible from a national forest highway by giving the engineer control over sources, put plaintiff on notice that other sources than those specified might have to be opened.

IX.

The district court erred in not holding that appellee's inspection of the site, his representation in his bid that he had had independently investigated and thoroughly checked conditions at the site, estopped him from asserting that the government had misrepresented or breached a warranty that there was an adequate supply of suitable material at the source to the right of Station 1239.

X.

The district court erred in imposing liability on the government for costs incurred by reason of plaintiff's having to resort to rock sources other than those he had, unilaterally, without communicating his intentions to the United States or its agents and without making the intentions part and condition of his bid or of the contract, determined to use.

XI.

The district court erred in holding the government liable for plaintiff's faulty inferences and for unforeseen difficulties encountered on the project.

XII.

The district court erred in holding that the extra cost of producing crusher run and rock from the source to the right of Station 870 was chargeable to the government.

XIII.

The district court erred in denying the government's motion for directed verdict on the ground that plaintiff's failure to take an appeal to the head of department in accordance with Article 15 of the contract barred recovery of the extra cost of rock production.

XIV.

The district court erred in giving undue effect to testimony that contractors were accustomed to rely on a designation of source as constituting a representation or warranty that an adequate supply of suitable material was available.

XV.

The district court erred in not holding that plaintiff had waived damages for misrepresentation by proceeding with the work at the quarry right of Station 1239 after representatives of the District Engineers Office had visited the site and determined it was adequate and suitable.

XVI.

The district court erred in finding that but for the fault of the government plaintiff would have completed his contract within the time limited.

XVII.

The district court erred in not finding that the liquidated damages assessed for plaintiff's delay and the extra expense in reprocessing and reshaping the roadway on his resumption of operations in 1938 were due to plaintiff's failure to commence work on the contract promptly and to prosecute it diligently.

XVIII.

The district court erred in finding that plaintiff's failure to complete the project within the time limited in the contract was due to the government's failure to furnish adequate and satisfactory quarries at the source to the right of Station 1239.

XIX.

The district court erred in entering judgment for plaintiff.

CARL C. DONAUGH,
United States Attorney.
By: J. MASON DILLARD,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

Service of the within Statement of Points is accepted in the State and District of Oregon this 26th day of March, 1945, by receiving a copy thereof, duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

JOHN LICHTY
of Attorneys for Appellee.

[Endorsed]: Filed May 12, 1945. Paul P. O'Brien, Clerk.